TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 820. 2/2

WILLIAM LUCKING, APPELLANT,

vs.

DETROIT AND CLEVELAND NAVIGATION COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED FEBRUARY 2, 1923.

(29,376)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 12, 1923.

1 UNITED STATES OF AMERICA:

In the District Court of the United States for the Eastern District of Michigan. In Equity.

BILL OF COMPLAINT.

(Filed March 25, 1921.)

To the Honorable, the Judges of said Court:

Plaintiff herein, William Lucking, respectfully shows:

(1) That he is a citizen and resident of the city of Detroit, county of Wayne and state of Michigan, and is of full age.

(2) That defendant herein, Detroit & Cleveland Navigation Company, is a corporation organized and existing under and by virtue of the Laws of the State of Michigan and having its principal office and place of business for the administration of its affairs in said city of Detroit, Michigan.

That the purposes of defendant's corporation as contained in its Articles of Association are as follows:

"Article I.

This corporation is formed for the purpose of engaging in the business of maritime commerce or navigation within this state or upon the frontier lakes, natural or artificial, connected therewith, and for acquiring, owning, holding and disposing of every kind of real and personal property, or estate, whatsoever, which may be necessary to enable this corporation to carry on the operations and business mentioned herein."

(3) That said defendant, Detroit & Cleveland Navigation Company, is now, and has been, for the last twenty years and more, during the navigation season, which includes the months of

2 May, June, July, August and September in each year, a common carrier for hire and engaged in both interstate and intrastate transportation of passengers and property on Lake Huron and Lake Erie and connecting waters.

That in such capacity defendant has each season carried large numbers of passengers and great amounts of property and freight over well known and defined routes, such as: (*a*) Between Detroit in the state of Michigan and Buffalo in the state of New York; (*b*) between Detroit in the state of Michigan and Cleveland in the state of Ohio; (*c*) between Toledo, Ohio, and Detroit, Michigan, and thence through Lake Huron to and from various cities and ports in Michigan, such as Port Huron, Harbor Beach, Oscoda, Alpena, Mackinac Island and St. Ignace.

(4) That said defendant, Detroit & Cleveland Navigation Company, has, in the transportationa of said passengers and property

in the past, transacted business of an interstate character between ports on its route in the state of Michigan and ports on its routes in the states of New York and Ohio; and plaintiff is informed and believes that defendant intends to and will continue such interstate business in its capacity as a common carrier for hire, during the navigation season of the year 1921, and thereafter.

That said defendant owns and operates in its said business as a common carrier for hire several large steamers of the side-wheel type, notably the City of Detroit III, City of Cleveland III, Western States, Eastern States, City of Mackinac II, City of Alpena II, and other vessels.

(5) That in the conduct of its said business as a common carrier for hire, said defendant, has, by arrangement with other common carriers by railroad, been engaged in the continuous transportation of passengers and property, partly by railroad and partly by water, from various ports and points on the routes reached by defendant's steamers to and from various points on the railroads of said other carriers.

That plaintiff is informed and believes that such continuous carriage of passengers and shipment of property has been performed during several years and more last past by defendant in conjunction with other common carriers by railroad and includes business both of an interstate and intrastate character. That among said common carriers by rail are Miihigan Central Railroad Com-
3 pany, Pennsylvania Railroad Company, The Detroit, Toledo & Ironton Railroad Company, the New York Central Lines, the Pere Marquette Railroad Company, the Detroit & Mackinac Railroad Company, Duluth, South Shore & Atlantic Railroad Company, and many others.

That such continuous carriage of passengers and shipment of property is had and performed by defendant and said other common carriers by rail through and by means of joint tariffs, rates and arrangements duly and formally entered into in accordance with law, and regularly enforced and operated under.

That plaintiff is informed and believes that defendant intends to and will continue through the navigation season of the year 1921 and thereafter to carry on its said business as a common carrier for hire generally and to transport as a common carrier for hire passengers and property in such continuous carriage and under such joint tariffs, rates and arrangements, as aforesaid, and that defendant will derive a fair and reasonable return therefrom.

Plaintiff is informed and believes that it has been the custom for defendant for several years last past to file with the Interstate Commerce Commission on the day before the opening of its navigation season a supplement to its tariffs, announcing that said joint tariffs with said other common carriers by rail are in force; and to file with said commission the day after said navigation season closes a supplement to its joint tariffs suspending the same during the closed or winter season.

(6) And plaintiff shows that one of the most popular and largely traveled routes on the Great Lakes for years and years has been

defendant's regularly defined and well known route or course from cities or points in the state of Ohio, to-wit: Cleveland and Toledo, to and from and between points and cities in Michigan, such as Detroit on the Detroit River, Port Huron on the St. Clair River, Harbor Beach, Oscoda, Alpena, Cheboygan, Mackinac Island and St. Ignace on Lake Huron.

That defendant has continuously during a period of ten years and more last past maintained regular service by its said steamers over said routes, and has carried and transported as a common carrier for hire (in accordance with its various published tariffs and schedules, reference to which is hereby made) tens of thou-
4 sands of passengers and hundreds of thousands of tons of property and freight.

(7) Plaintiff is informed that in the conduct of its said business as a common carrier for hire, said defendant has made large profits on its capital investment therein, and has, in so doing, availed itself of the many valuable and costly river and harbor improvements maintained by the United States as an aid to navigation along said water routes, as aforesaid. And plaintiff further shows on information and belief, that if the operation by defendant of its steamers, City of Mackinac II, and City of Alpena II, has resulted in any loss, as plaintiff is informed defendant claims to be the case, that nevertheless defendant's business as a whole, from its operations on all its routes, has resulted, in the past, in a considerable net profit to it.

And in that connection the plaintiff shows and charges that defendant's business as a common carrier for hire during the year 1919 resulted in a net profit of over $1,100,000, which was over $600,000 more than its net profit for the year 1918; and further that from said net profit during 1919 defendant transferred to its surplus account over $600,000, which was an increase of about $500,000 over the amount transferred by it to surplus in 1918.

That said defendant paid dividends of 10 per cent in 1919 upon its capital stock outstanding amounting to about $4,900,000; and dividends thereon in 1918 of at least 8 per cent; and now has a large surplus on hand.

And plaintiff shows and charges upon information and belief that defendant has made a large net profit in the past from its transportation of passengers and freight over its said Detroit to Mackinac route.

(8) That continuously for several years and more and as plaintiff believes, twenty to thirty years, said defendant has maintained and operated the steamers City of Mackinac II and City of Alpena II, between points in Ohio, to-wit: Toledo to Detroit, Michigan, and thence northerly to and from said points and ports on Lake Huron.

That many of the said ports and cities on Lake Huron were developed and built up in part by and depend to a great extent on the services rendered by defendant's said steamers City of Mackinac II and City of Alpena II, during the navigation season of
5 each year, and transport therein large amounts of freight

and great numbers of passengers to and from points on said route in Lake Huron, and to and from points and ports on Lake Huron to and from points and ports on defendant's routes in Ohio and New York on Lake Erie, and to and from ports, cities and destinations on the lines of said different common carriers by railroad in such continuous carriage of passengers and shipment of property as aforesaid.

That large amounts of the products of the said ports, cities and small towns and surrounding territory on defendant's said route, familiarly known as the Detroit and Mackinac Route, such as manufactured articles of all kinds, automobiles, tractors, farm produce, and supplies of all kinds for summer residents and the like, are regularly from year to year during said navigation season, transported by defendant's said steamers, City of Mackinac II and City of Alpena II, which have maintained a regular service of four trips per week in each direction. That is, four departures from St. Ignace every week for Detroit and Toledo and way ports on defendant's said route, and four from Detroit and Toledo every week for St. Ignace and way ports.

(9) That plaintiff has in the past, and intends to in the future, become a passenger on said steamers of defendant running between Detroit and Mackinac Island, and has shipped property, such as household furniture and supplies for his summer residence, on said steamers and wishes and intends to do the same during the navigation season of said year 1921, and thereafter.

(10) That plaintiff has been informed and believes, because of an alleged dissatisfaction on the part of said defendant with some of the navigation laws of the United States, commonly referred to as the "Seaman's Act," that defendant has threatened to and intends to discontinue and abandon the operation of its said steamers, City of Mackinac II and City of Alpena II, entirely over said Detroit and Mackinac Route. That articles have recently appeared in the daily newspapers of Detroit purporting to be statements issued by the defendant to the effect that it will abandon its said service on said Mackinac Route and leave its said steamers, City of Mackinac II and City of Alpena II, idle. That such public statements of defendant have not been denied so far as plaintiff can ascertain,
6 and an article published in the Detroit Journal of January 7, 1921, is attached hereto as Exhibit A.

And plaintiff shows upon information and belief that it is the intention of defendant to so abandon said Mackinac Route, as aforesaid, and leave the territory served thereby without such transportation facilities.

(11) That, as plaintiff believes, it is necessary each spring before the opening of navigation for defendant to overhaul, repair and repaint said steamers in preparation for operation during the coming season. That defendant's season on said Detroit and Mackinac Route opens about May 1st, and plaintiff believes that at least two months are required for the necessary overhauling, repairing and repainting of said steamers. Plaintiff shows on information and belief that defendant, following out its expressed intention to

abandon said route, as aforesaid, does not intend to and will not give such directions and instructions to its employees as will result in the said steamers being made ready to commence said service as usual and at the customary time.

(12) And plaintiff shows and charges that it is defendant's duty, both at common law and under the acts of Congress hereinafter referred to, to provide and furnish such transportation of passengers and property during its navigation season for the year 1921 and thereafter, over said Detroit and Mackinac Route, as has been the usual custom and course of business of defendant in the past.

And plaintiff believes and charges that it is the determination and decision of defendant to abandon said service on the Detroit and Mackinac Route, and that such action of defendant is contrary to law and the acts of Congress, and in particular the acts known as the Interstate Commerce Act, as amended, as follows:

"Sec. 1. (As amended June 29, 1906; April 13, 1908; June 18, 1910; February 17, 1917; March 2, 1917; May 29, 1917; August 10, 1917, and February 28, 1920).

(1) That the provisions of this act shall apply to common carriers engaged in:

(*a*) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or * * *

7 (3) * * * Wherever the word 'carrier' is used in this act it shall be held to mean 'common carrier.' * * * the term, 'transportation,' as used in this act shall include locomotive cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

* * * (4) It shall be the duty of every common carrier subject to this act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes, and providing for reasonable compensation to those entitled thereto, and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless, as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. * * *

(6) It is hereby made the duty of all common carriers subject

to the provisions of this act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing and delivery of property subject to the provisions of
8 this act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. * * *

Sec. 3. (As amended February 28, 1920).

(1) That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *

(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

(13) Plaintiff shows that about the 15th day of February, 1921, he filed a petition similar hereto with the Interstate Commerce Commission, reference to which is hereby made.

That said commission has ruled that it has no jurisdiction in the premises, which ruling plaintiff avers is in accordance with law, and plaintiff further shows that the relief herein prayed for must be afforded by the courts and not by an administrative body.

(14) That this bill of complaint is filed also on behalf of all other persons, firms, corporations or associations, either private or municipal, who may desire to intervene and be heard.

Wherefore, plaintiff being without remedy save in this court, prays:

(*a*) That defendant be required to appear and answer this bill in accordance with the rules and practices of this court.

9 (*b*) That this honorable court will order, adjudge and

decree that defendant, Detroit & Cleveland Navigation Company, furnish proper and suitable transportation for passengers and property during its navigation season of 1921, and thereafter over said Detroit and Mackinac Route, with rates and charges on a reasonable and fair basis, and to provide reasonable facilities for such transportation, and to make reasonable rules and regulations with regard to the operation of said steamers on said route; and in general to operate its said steamers on all said routes according to its custom and usage in the past.

(*c*) That defendant be temporarily and permanently enjoined by this court from discontinuing such transportation over said Detroit to Mackinac Route and the operation of its said vessels over said route, in accordance with its usual custom in the past.

(*d*) That defendant be further ordered and directed by the injunction of this court to make all necessary preparations in the way of repairs and repainting said steamers, City of Mackinac II and City of Alpena II, so that the same will be ready for such service on said Detroit and Mackinac Route at the opening of navigation in the year 1921, as has been the custom and usage of defendant in the past.

That plaintiff may have such other and further relief as may be necessary and proper in the premises. William Lucking. William Lucking, for Plaintiff.

STATE OF MICHIGAN,
County of Wayne, ss:

William Lucking being duly sworn, deposes and says that he has read the foregoing bill of complaint by him subscribed and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters, he verily believes it to be true. William Lucking.

Subscribed and sworn to before me this 25th day of March, 1921. Lawrence M. Sprague, Notary Public, Wayne County, Michigan. My commission expires October 21, 1924. (Exhibit A—newspaper clipping.)

10 **MOTION TO DISMISS AND ANSWER TO THE BILL OF COMPLAINT.**

[Filed April 11, 1921.]

The defendant moves to dismiss the bill of complaint filed herein for the reason that by the said bill it appears:

(1) That this court is without jurisdiction to entertain the same.

(2) That the plaintiff is not entitled to the relief prayed therein, and, without waiving the benefit of said motion, for answer to said bill, defendant says:

1. It admits the allegations of paragraph 1 of said bill.
2. It admits the allegations of paragraph 2 of said bill, except that

Article I of its Articles of Association, therein purported to be quoted, is incorrectly quoted, and the words, "or other navigable waters," should be inserted before the words, "natural or artificial."

3. It admits the allegations contained in the second clause of paragraph 3 of said bill, except that it has not for more than a year last past operated a route between Toledo, Ohio, as alleged, and St. Ignace, Michigan. It has, however, operated a route between Detroit, Michigan, and St. Ignace, Michigan.

4. It admits, as alleged in paragraph 4 of said bill, that it has transacted business of an interstate character between he port of Detroit and the port of Buffalo, New York, and between the port of Detroit and the port of Cleveland, Ohio, and that it intends to continue to carry on such business during the current year.

It admits that it owns and operates steamers as alleged in said paragraph.

5. It denies the allegations contained in paragraph 5 of the bill, except as they are hereinafter admitted, and shows to the court that for some years last past it has filed with the Interstate Commerce Commission tariffs from which rates can be determined for transportation from points in trunk line territory lying east of Buffalo over its Buffalo division to Detroit, and points west of Detroit, and also to ports on its Mackinac Division, and from such ports and from points west of Detroit to Buffalo and to points east of Buffalo, and likewise from points south and west of Cleveland, Ohio, to
11 Detroit and points lying west and north of it, upon railroads, and also to ports lying on its Mackinac Division, and likewise from such ports and from such points on railroads north and west of Detroit to Cleveland and points lying south and west of Cleveland; that in the case of several rail carriers concurrences have been filed to said tariffs, but scarcely any traffic of any kind has moved under any of said tariffs; that under the proportional rates from trunk line territory to ports on the Mackinac Division no traffic has moved, nor has any under the tariffs from central traffic territory to ports on the Mackinac Division; that no tariff is in effect from points in central traffic territory by this company's route to points on the Duluth, South Shore & Atlantic Railroad, and that no tariff is in effect from trunk line territory by this company's lines to points on said Duluth, South Shore & Atlantic Railroad; that it has filed a tariff under which traffic might be carried from Cleveland, Ohio, and from Buffalo, New York, via its lines to points on the Duluth, South Shore & Atlantic Railroad, although very little, if any, traffic has been carried thereunder, but that no tariff is in effect from points on the Duluth, South Shore & Atlantic Railroad via this company's lines, either to Cleveland or to Buffalo, or to points beyond either of those cities. That defendant does not now intend to cancel such tariffs as have been filed as above set forth. That almost all of the business of the defendant is carried under its local tariffs covering transportation from port to port.

6. Defendant admits that for many years it has maintained a regular service between Cleveland, Ohio, and Detroit, Michigan, known as its Cleveland Division, and a route between Detroit, by

Detroit River, St. Clair River and Lake Huron, to St. Ignace, Michigan; that for some years it operated this division to the city of Toledo, Ohio, but that for several years past the cost of operating to Toledo exceeded the revenue derived from maintaining service to that city, and since the close of the season of 1919, it has not operated any steamers to said city, but has operated its Mackinac Division only between the cities of Detroit and St. Ignace, Michigan. It admits that it has carried and transported for hire many thousands of passengers over its Mackinac Division during the last ten years, but it denies that it has carried over that division hundreds
12 of thousands of tons of property and freight, and shows that in said period it has carried in the aggregate only about 130,000 tons of freight; that in the year 1917 it carried about 12,700 tons of freight in the aggregate on said division; in the year 1919, about 10,600 tons; in the year 1919, about 9,600 tons; and in the year 1920, less than 4,000 tons. That during said period of ten years it has never carried in any one year as many passengers as it carried in the year 1911; that in the year 1920 it carried less than half as many as it carried in the year 1911.

7. It admits the allegations contained in paragraph 7 of said bill, except the last allegation that it has made large net profits in the past from its transportation of passengers and freight over its route between Detroit and Mackinac. It shows that this allegation, made upon information and belief, is untrue; that for many years past it has not made large net profits on said division, but, on the contrary has, in recent years, operated said division at a loss; and that in each of the several years last past the cost of operating to St. Ignace and Mackinac has greatly exceeded the revenue derived from maintaining such service.

8. It admits that for several years it has operated the steamers, Mackinac II and the Alpena II, on the Mackinac Division above described. It denies that many of the ports and cities on Lake Huron were developed and built up in part by and depend to a certain extent upon the service rendered by said steamers. It denies that said steamers transported to said ports large amounts of freight and great numbers of passengers. It denies that it transports any considerable amount of freight or any considerable number of passengers between ports on Lake Huron and ports on defendant's routes in the state of Ohio and the state of New York and cities on the lines of railroad carriers beyond the ports in said last named states. It denies that large amounts of the products of said ports and the surrounding territory on said Mackinac Division are carried by it on said steamers during the navigation season, the total amount of freight carried by said steamers being as has been above set forth.

It shows that all of the ports to which said divisions has been operated along the shores of St. Clair River and Lake Huron for many years last past have been reached by railroad, except the port of Mackinac Island, which is reached by railroad and passen-
13 ger ferry; that the construction and operation of these railroad lines has very largely diminished the traffic carried by

this division to and from its ports of call; that the general business done at most of the ports of call on Lake Huron has been for several years last past diminishing, and that the tourist passenger business to and from Mackinac Island has diminished rather than increased during the last ten years.

9. Defendant is ignorant of the allegations contained in paragraph 9 of said bill, and leaves plaintiff to make such proofs thereof as his counsel may advise.

10. Defendant admits that it intends to discontinue and abandon the operation of its steamer, Mackinac II and its steamer Alpena II, over said Mackinac Division. It denies that its intention is based wholly upon its dissatisfaction with the so-called Seaman's Act. It denies that the abandonment of said division will leave the territory which its steamers have served without transportation facilities, and shows, as it has already alleged, that the ports at which it has heretofore touched are served by railroad. It further shows, that the enforcement of the terms of said Seaman's Act has added to its expenses incident to the operation of said line, and that it has been unable, without even greater loss by reason of the terms of said act, to operate its steamers on said route during the early part and during the latter part of the season of navigation. It shows that irrespective of the requirements of said act its operating expenses have been very largely increased during the last few years by the increase in the wages which it has been obliged to pay its officers and crews, and by the increase in the cost of fuel and supplies and food; that it has endeavored, by careful management and foresight, to continue the operation of said line without a large net loss, but owing to the increase in operating expenses, due in part to the operation of said Seaman's Act and in part to general business conditions resulting in such increases in wages, fuel costs, supplies and food costs, and the diminishing amount of traffic which it has been able to secure, its efforts have been unavailing and it has incurred net losses as above alleged.

11. It admits the allegations contained in paragraph 11 of said bill.

12. It denies the allegations contained in paragraph 12 of said bill.

14 13. It admits the allegations as to the filing and the dismissal of the petition contained in paragraph 13. It denies that the relief prayed by the plaintiff can be afforded by the courts. It denies that the plaintiff is entitled to any of the relief prayed in said bill or to any part thereof, and prays to be hence dismissed with its reasonable costs sustained. Detroit & Cleveland Navigation Company, by Arnold A. Schantz, its President. Angell, Turner & Dyer, Attorneys for Defendant.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 16th day of April, A. D. 1921, before me, the subscriber, a notary public in and for said county, personally appeared Arnold

A. Schantz, who made oath that he was the president of the Detroit & Cleveland Navigation Company, the above named defendant, and is authorized to make this answer in its behalf; that he has read the foregoing answer by him subscribed, and knows the contents thereof, and that the same is true. Bert C. Wilder, Notary Public, Wayne County, Michigan. My commission expires February 25, 1923.

OPINION ON MOTION TO DISMISS.

[Filed May 20, 1921.]

TUTTLE, *District Judge:* This cause is before the court on motion to dismiss the bill of complaint.

15 The material allegations of such bill are as follows: That plaintiff is a citizen and resident of the city of Detroit, Michigan, which is situated in this district; that the defendant is a Michigan corporation, having its principal office and place of business in said city, and that it was incorporated for the purpose of engaging in the business of maritime commerce; that said defendant is now, and has been for the last twenty years and more, during the navigation season, which includes the months of May, June, July, August and September, a common carrier for hire and engaged in interstate and intrastate transportation of passengers and property on Lake Huron and Lake Erie, and connecting waters; that in such capacity defendant has each season carried many passengers and much freight over well-known and defined routes, such as between Detroit, Michigan, and Buffalo, New York, between Detroit and Cleveland, Ohio and between Toledo, Ohio, and Detroit, Michigan, and thence through Lake Huron to and from various cities and ports in Michigan, on said Lake Huron, including Port Huron, Harbor Beach, Oscoda, Saginaw, and other places; that defendant will continue its interstate business, in its capacity as a common carrier for hire, during the navigation season of 1921 and thereafter; that defendant owns and operates in its said business several large steamers; that in the conduct of such business defendant has, by arrangement with other common carriers by railroad, been engaged in the continuous transportation of passengers and freight, partly by railroad and partly by water, from various ports on the routes reached by defendant's steamers to and from various points on the railroads of said other carriers, in both interstate and intrastate commerce, by means of joint tariff rates and arrangements duly entered into in accordance with law and that defendant will continue so to do through the navigation season of the year 1921, and afterwards, and will derive a fair and reasonable return therefrom; that it has been the custom of defendant for several years past to file with the Interstate Commerce Commission, just before the opening, and just after the close, of its navigation season supplements to its tariffs announcing the establishment and the suspension, respectively, of said joint tariffs with said other railroad carriers; that one of the most popular and

largely traveled routes on the Great Lakes for years has been that
of the defendant from Cleveland and Toledo, Ohio, to and
16 from Detroit and the cities and ports on Lake Huron already
referred to; that in the conduct of its said business as a common carrier for hire, said defendant has made large profits on its capital investment therein, and in so doing, has availed itself of many valuable and costly river and harbor improvements maintained by the United States as an aid to navigation along said water routes; that for several years continuously defendant has operated certain of its steamers over its route, familiarly known as the Detroit & Mackinac Route, between Toledo, Ohio, and Detroit, Michigan, and thence northerly to and from said points on Lake Huron, and that many of the communities on said Lake Huron depend largely on the service rendered by said steamers during the navigation season of each year and transport therein large quantities of freight and great numbers of passengers to and from points in Ohio and New York, and to and from cities and destinations on the lines of said common carriers by railroad in said continuous carriage; that such freight is transported by defendant regularly, from year to year, during the navigation season, in said steamers, which have maintained a regular service of four trips per week in each direction on said Detroit and Mackinac Route, including four departures from said points on Lake Huron for Detroit and Toledo and way ports on said route, and four departures from Detroit and Toledo for said way ports on Lake Huron; that plaintiff in the past has, and in the future intends to, become a passenger on said steamers of defendant over said route, and has shipped property, including household furniture and supplies for his summer residence, on said steamers and desires to continue to do so during the navigation season of the year 1921 and thereafter; that plaintiff has been informed and believes that because of an alleged dissatisfaction on the part of defendant with one of the navigation laws of the United States, commonly referred to as the "Seaman's Act," defendant has threatened, and intends, to discontinue and abandon the operation of its said steamers over said Detroit and Mackinac Route; that it is necessary, before the opening of the navigation season, for the defendant to overhaul and repair said steamers in preparation for operation during the coming season, but that defendant, following its expressed intention to abandon said route,
will not prepare said steamers for their usual and customary
17 transportation service; that it is the duty of defendant, both
at common law and under the federal statutes, including the Intrastate Commerce Act, to provide and furnish such transportation during 1921 and thereafter, over said route, as has been its usual custom in the past; that plaintiff has heretofore filed a petition, similar to its present bill, with the Interstate Commerce Commission, but that said commission has ruled that it has no jurisdiction in the premises; and that this bill is filed also on behalf of all other persons and corporations who may desire to intervene herein.

The specific relief prayed includes an order requiring defendant

to furnish proper and suitable transportation for passengers and property during its navigation season of 1921, and thereafter, over said Detroit and Mackinac Route, according to its past custom; an injunction restraining the defendant from discontinuing such transportation over said route; and a mandatory injunction requiring the defendant to prepare its said steamers for service on said route during the ensuing season of navigation in accordance with its past custom.

The defendant has filed a motion to dismiss the bill of complaint, alleging that it appears from said bill (1) that this court is without jurisdiction in the premises and (2) that the plaintiff is not entitled to the relief prayed. These two objections will be considered in the order named, the allegations of fact contained in the bill being, of course, accepted as true for the purposes of the motion to dismiss.

1. Has this court jurisdiction to entertain the bill and to grant any of the relief prayed? Diversity of citizenship is not involved and the necessary jurisdiction must depend upon the presence of a federal question. Is this, then, a case arising under the constitution or laws of the United States?

As already noted, one of the contentions of the plaintiff is that the proposed discontinuance by the defendant of the operation of its steamers over the route referred to would be a violation of the Interstate Commerce Act, certain provisions of which, claimed by plaintiff to be applicable, are quoted in its bill.

It is, of course, well settled that if the result of a suit depends upon the construction and effect of a federal statute, such a suit arises under the laws of the United States, within the meaning of the constitutional provision conferring jurisdiction upon the
18 federal courts in such cases. Louisville & Nashville R. R. Co. v. Rice, 247 U. S., 201, 62, L. Ed., 1071.

It is equally well settled that where the plaintiff in a case plants a claim for relief upon a federal law and such claim is apparently made in good faith, is based upon real and substantial grounds, and is not so unreasonable and wholly destitute of merit as to be merely frivolous and colorable, such a case presents a federal question within the general jurisdiction of the federal court, irrespective of the presence or absence of diversity of citizenship. Boston Store v. American Graphophone Co., 246 U. S., 8, 62, L. Ed. 551.

Plaintiff invokes the Interstate Commerce Act as a basis for its claim to relief. The first subdivision of the first section of said Interstate Commerce Act (the act of February 4, 1887, chapter 104, 24 Stats. at Large, 379, as amended) provides that the provisions of such act shall apply to common carriers engaged in "the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement, for a continuous carriage or shipment." The fourth subdivision of the same section provides that "It shall be the duty of every common carrier subject to this act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares,

and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto. "Considering, then, these provisions of the statute in connection with the allegations in the bill of complaint to the effect that in the conduct of its business as a common carrier the defendant "has, by arrangement with other common carriers by railroad, been engaged in the continuous transportation of passengers and property, partly by railroad and partly by water, from various ports and points on the routes reached by defendant's steamers to and from various points on the railroads of said other carriers," and in view of the allegations in the bill as to the interstate character of the commerce carried by the defendant over its various routes, I cannot avoid the conclusion that plaintiff has stated a claim for relief based upon a federal
19 law, and that such claim is not so unsubstantial and unreasonable as to be frivolous and merely colorable. The bill raises, in my opinion, a real and substantial federal question which it is the duty of this court to consider and decide. It follows that the objection based upon the supposed lack of jurisdiction of the court to entertain this suit must be overruled.

2. Coming, then, to consider the merits of the case, as shown by the bill, the question presented is whether a common carrier by water, after establishing several regular routes for the transportation of passengers and freight by vessel, in both interstate and intrastate commerce, is under any legal obligation to continue to operate its vessels in such transportation over all of such routes, in the absence of a franchise or other arrangement with the state imposing upon it such an obligation.

Plaintiff contends that the duty to continue such operation is created both by the Interstate Commerce Act and also by the common law. If such duty does arise from either of the sources mentioned, plaintiff is entitled to the relief prayed in this court, since the federal jurisdiction, having been invoked upon real and substantial grounds of federal law, extends to the determination of all questions involved in the case, whether resting upon federal or state law, and irrespective of the disposition made of the federal question involved. Greene v. Louisville & Interurban Railroad Co., 244 U. S. 499, 61 L. Ed. 280.

As the federal statute thus invoked must be construed in the light of the circumstances existing and known to Congress at the time of its enactment, including the state of the common law then in force, it will be more convenient to first consider the extent of the duty of a common carrier, with reference to the subject under consideration, at the common law. It is elementary that it is the duty of a common carrier, even in the absence of any statute to that effect, as incidental to the occupation in which it is engaged, to receive and carry freight and passengers, upon reasonable request therefor, without discriminations and on reasonable rates and charges. Winona and St. Peter Railroad Co. v. Blake, 94 U. S., 180, 24, L. Ed. 99; Louisville & Nashville Railroad Co. v. F. W. Cook Brewing Co., 223 U. S., 70,

56, L. Ed. 355; Chicago, Rock Island & Pacific Railway Co. v. Lawton Refining Co., 253 Fed., 705; 10 Corpus Juris, 65.

No authority, however, has been called to my attention, and I have discovered none, to the effect that a common carrier such as the defendant here, not enjoying any public franchises or exercising any public powers or privileges is bound, after commencing to operate vessels over a certain route, to continue such operation if it finds it desirable to discontinue and abandon the same.

It is true that common carriers like railroad companies, which enjoy peculiar rights and powers at the hands of the state, are not permitted to discontinue at will the rendition of the transportation services for the performance of which they have been endowed with such special privileges and powers. A railroad company is clothed by the state with special rights, franchises and privileges, including certain attributes of sovereignty itself, as for example, the power of eminent domain. Enjoying, therefore, as it does, these special and public powers, such railroad company is subject to correspondingly special and public duties, among which is the obligation, arising by operation of law from the acceptance of its rights and franchises, and continuing during its enjoyment thereof, to continue to operate as a common carrier over the lines and routes established by it for that purpose, such obligation arising out of, and depending upon, the unusual and peculiar rights and privileges so exercised by it. Missouri Pacific Railway Co. v. Kansas, 216 U. S. 262, 54, L. Ed. 472; Chesapeake & Ohio Railway Co. v. Public Service Commission, 242 U. S., 603, 61, L. Ed. 520; 4 Ruling Case Law, 672; 22 Ruling Case Law, 750.

The reasons, however, which underlie and prompt the imposition of this duty upon common carrier railroad companies do not apply to common carriers such as the defendant. The latter holds no public franchise and enjoys no rights or privileges other than are held by any private individual desiring to engage in the business of transporting freight and passengers by water. It cannot exercise the power of eminent domain. It has no private right of way or special facilities for acquiring means of access by its vessels to docks or wharves, but must use the open sea as its highway and depend, for the proper maintenance of its vessel and equipment, upon such arrangements as it may be able to make by private contract, like any other private citizen. In the eyes of the law it occupies no different position than that of a common carrier operating taxicabs or other vehicles upon land, and it is under no greater obligation than is the common carrier last mentioned, so far as the continued operation of its lines is concerned. It has never been supposed, and could not seriously be contended, that every person who engages in the business of transportation as a common carrier is obliged to continue in such business indefinitely and may be restrained by injunction from abandoning such of its routes as it may wish to discontinue.

The mere fact, then, that the defendant is a common carrier does not subject it to the duty to continue the operation of its vessels over

any or all of its routes of transportation. As, therefore, it does not appear that the defendant is a public or quasi-public corporation, or exercises any powers or rights from which flow the duty in question, I am unable to find in the common law any basis or warrant for the coercive order sought, and I am clearly of the opinion that in the absence of some statutory provision applicable the plaintiff is not entitled to the relief prayed.

Is there, then, any statutory provision which prevents the defendant from exercising the right, which it otherwise had, to withdraw from the business in which it has been engaged, to the extent which it deems necessary or desirable? Plaintiff invokes the fourth subdivision of the first section of the Interstate Commerce Act, hereinbefore quoted, to the effect that "it shall be the duty of every common carrier subject to this act, engaged in the transportation of passengers or property, to provide and furnish such transportation upon reasonable request therefor." This language was imported into the statute by the Hepburn Act (the act of June 29, 1906) and is merely declaratory of the common law rule governing the duty of common carriers. Menasha Paper Company v. Chicago & Northwestern Railway Co., 241 U. S., 55, 60 L. Ed., 885; 10 Corpus Juris, 66. It is to be observed that the provision in question applies to common carriers subject to the act "engaged in the transportation" of passengers or property, and the obligation referred to is the duty "to provide and furnish such transportation upon reasonable request therefor." It is clear that the meaning and effect of this language is that a common carrier, subject to the act, which is actually engaged in transporting passengers or freight must receive and carry such passengers or freight as may be offered to it, without discrimi-
22 nation, and in the performance of the duty under which it rests so long as it holds itself out as a carrier of such passengers or freight, to provide the necessary facilities and equipment for "such transportation," provided that "reasonable request" is made therefor. There is nothing in this or any other section of the statute which prevents a common carrier, such as the defendant, from disengaging itself from the transportation of passengers or freight between particular points, or which makes it the duty of such a carrier to furnish such transportation if it is not actually "engaged in" the business of furnishing any transportation between such points. If in the present case the grievance of the plaintiff were that the defendant, while engaged in transporting passengers and freight over its so-called Detroit and Mackinac Route, refused or failed to furnish adequate facilities or equipment for such transportation, the claim of plaintiff for proper relief from such a situation on the ground that the defendant was violating a duty created or expressed in the language just quoted would not be without force. The situation, however, actually presented is quite different. To the extent that defendant discontinues the furnishing of any transportation over one of its routes, to that extent it ceases to be engaged as a common carrier in transportation or subject to the obligation referred to in this portion of the statute. Considering the right which a carrier such as defendant has at common law to abandon entirely one or

more routes for the operation of its vessels, an intention on the part of Congress to take away such right and impose on such a carrier the duty resting upon a carrier by railroad in this respect, cannot be deduced from language which falls so far short of expressing such an intention as does the provision now under consideration. It would have been easy to have expressed such a purpose, and it must be assumed that if Congress had intended to create such an obligation, in derogation of the common law rule applicable, it would have done so in appropriate terms.

The conclusion, moreover, that it was not intended by the Interstate Commerce Act to impose upon such a carrier the obligation mentioned, is strengthened and confirmed by the provision in the eighteenth subdivision of section 1 of the act to the effect that "No carrier by railroad, subject to this act, shall abandon all or any portion of a line of railroad, or the operation thereof, unless and
23–26 until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." In this part of the statute, Congress has legislated upon the subject of the abandonment of existing lines of transportation and in so doing it has expressly imposed the limitations created, not upon "every common carrier subject to this act," as in other sections and clauses of the statute, but only upon a "carrier by railroad subject to this act." Expressio unius exclusio alterius. The express imposition of this obligation upon common carriers by railroad evidences, in my opinion, an intention to exclude from the burden thereof every other common carrier. But, however, this may be, I am unable to discover in any of the comprehensive terms of the statute invoked any language indicating a purpose to subject a carrier such as the defendant to the duty which plaintiff seeks to have this court enforce. Nor do I know of any statutory provision creating such an application or any decision applying or announcing such a rule, none of the cases cited by plaintiff involving a proposed discontinuance or abandonment of a route of transportation by such a carrier.

For the reasons stated, it results that the motion to dismiss the bill must be granted, and an order will be entered accordingly. Arthur J. Tuttle, District Judge. Detroit, Michigan, May 20, 1921.

27 **MEMORANDUM ON MOTION FOR REHEARING.**

[Filed June 8, 1921]

Tuttle, district judge. Plaintiff has filed a motion for a rehearing and in support thereof has submitted a brief which has received careful consideration.

Counsel for plaintiff lays considerable stress upon the words, "engaged in the transportation of passengers or property," quoted in my former opinion from the Interstate Commerce Act. The addition by the Transportation Act of February 28, 1920, of these words to the sentence as it previously stood did not increase or other-

wise alter the nature and extent of the duty imposed upon the common carriers to which it applied. I am well satisfied that this provision of the Interstate Commerce Act relied on by plaintiff did not, before the 1920 amendment, as it does not now, prevent a carrier such as defendant from discontinuing one or more of its routes.

Counsel cites and relies on Section 4 of Act 300 of Michigan Public Acts of 1909, providing that "every common carrier is hereby required to furnish reasonably adequate service and facilities and shall provide and furnish transportation of passengers and property upon reasonable request therefor." In view of the language of Section 3 of said act, defining the term, "common carrier," as used in said act, as meaning and referring to railroad companies, express companies, and other carriers wholly by railroad, or partly by rail and partly by water, this statute has no application to the defendant company. Moreover, even if so applied, the provision cited is substantially the same, in scope, and effect, as the clause of the Interstate Commerce Act already mentioned and falls equally short of imposing upon the defendant carrier the obligation to which plaintiff claims that it is subject.

Furthermore, Act 56 of the Michigan Public Acts of 1919, entitled, "An act to regulate the discontinuance of service by certain common carriers," etc., prohibiting the abandonment by any railroad common carrier of any of its lines without the permission of the Michigan Railroad Commission, indicates on the part of the Michigan Legislature, by confining its application to such carriers, the same intention to leave other carriers free to discontinue service on
28 their routes, as is indicated on the part of Congress by the eighteenth subdivision of the first section of the interstate commerce act referred to in my former opinion in this case.

Plaintiff again invokes the decision in the case of Chesapeake & Ohio Railway Company v. Public Service Commission, cited in the previous opinion of this court. That case, however, involved a railroad company and an examination of the opinions therein, both of the state court (from which counsel quotes in his brief) and of the United States supreme court, clearly shows that the rule there applied to the railroad in question is not applicable to a private common carrier, such as the defendant in the instant case.

The motion for a rehearing and the brief in support thereof have been closely examined and carefully considered, but I find therein no argument substantially different from those previously advanced and no reason for changing or modifying any of the views reached and expressed by me in my opinion already filed. Further reflection serves merely to strengthen my former conviction of the correctness of such conclusions.

The motion is denied. Arthur J. Tuttle, District Judge. Detroit, Michigan, June 8, 1921.

29 *Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.*

DECREE.

[Filed Nov. 7, 1922.]

Appeal from the District Court of the United States for the Eastern District of Michigan. This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan and was argued by counsel.

On Consideration Whereof, it is now here ordered adjudged and decreed by this Court, that the decree of the said District Court in this cause be and the same is hereby affirmed with costs.

30 [Title omitted.]

OPINION.

(Filed Nov. 7, 1922.) 284 F. 487

Submitted March 10, 1922. Decided November 7, 1922.

Before Knappen, Denison, and Donahue, Circuit Judges.

The parties below were aligned as here. The appeal is from an order dismissing plaintiff's bill in equity. The following excerpt from the opinion of District Judge Tuttle (273 Fed. 577) succinctly and sufficiently states the case as presented by the bill and the motion to dismiss.

"This cause is before the court on motion to dismiss the bill of complaint. The material allegations of such bill are as follows:

That plaintiff is a citizen and resident of the city of Detroit, Mich., which is situated in this district; that the defendant is a Michigan corporation, having its principal office and place of business in said city, and that it was incorporated for the purpose of engaging in the business of maritime commerce; that said defendant is now, and has been for the last 20 years and more, during the navigation season, which includes the months of May, June, July, August, and September, a common carrier for hire, and engaged in interstate and intrastate transportation of passengers and property on Lake
31 Huron and Lake Erie and connecting waters; that in such capacity defendant has each season carried many passengers and much freight over well-known and defined routes, such as between Detroit, Mich., and Buffalo, New York, between Detroit and Cleveland, Ohio, and between Toledo, Ohio, and Detroit, Mich., and thence through Lake Huron to and from various cities and ports in Michigan, on said Lake Huron, including Port Huron, Harbor Beach, Oscoda, St. Ignace, and other places; that defendant will continue its interstate business, in its capacity as a common carrier for hire, during the navigation season of 1921 and thereafter; that

defendant owns and operates in its said business several large steamers; that in the conduct of such business defendant has, by arrangement with other common carriers by railroad been engaged in the continuous transportation of passengers and freight, partly by railroad and partly by water, from various ports on the routes reached by defendant's steamers to and from various points on the railroads of said other carriers, in both interstate and intrastate commerce, by means of joint tariff rates and arrangements duly entered into in accordance with law, and that defendant will continue so to do through the navigation season of the year 1921 and afterwards, and will derive a fair and reasonable return therefrom; that it has been the custom of defendant for several years past to file with the Interstate Commerce Commission, just before the opening and just after the close of its navigation season, supplements to its tariffs announcing the establishment and the suspension respectively, of said joint tariffs with said other railroad carriers; that one of the most popular and largely traveled routes on the Great Lakes for years has been that of the defendant from Cleveland and Toledo, Ohio, to and from Detroit and the cities and ports on Lake Huron already referred to; that in the conduct of its said business as a common carrier for hire said defendant has made large profits on its capital investment therein, and in so doing has availed itself of many valuable and costly river and harbor improvements maintained by the United States as an aid to navigation along said water routes; that for several years continuously defendant has operated certain of its steamers over its route, familiarly known as the 'Detroit and Mackinac Route,' between Toledo, Ohio, and Detroit, Mich., and thence northerly to and from said points on Lake Huron, and that many of the communities on said Lake Huron depend largely on the service rendered by said steamers during the navigation season of each year,
32 and transport therein large quantities of freight and great numbers of passengers to and from points in Ohio and New York, and to and from cities and destinations on the lines of said commen carriers by railroad in said continuous carriage; that such freight is transported by defendant regularly from year to year, during the navigation season, in said steamers, which have maintained a regular service of four trips per week in each direction on said Detroit and Mackinac route, including four departures from said points on Lake Huron for Detroit and Toledo and way ports on said route, and four departures from Detroit and Toledo for said way ports on Lake Huron; that plaintiff in the past has, and in the future intends to, become a passenger on said steamers of defendant over said route, and has shipped property including household furniture and supplies for his summer residence, on said steamers, and desires to continue to do so during the navigation season of the year 1921, and thereafter; that plaintiff has been informed and believes that, because of an alleged dissatisfaction on the part of defendant with one of the navigation laws of the United States, commonly referred to as the 'Seamen's Act' (Act March 4, 1915, c. 153, 38 Stat. 1164), defendant has threatened, and intends, to discontinue and abandon the operation of its said steamers over said Detroit and

Mackinac route; that it is necessarily, before the opening of the navigation season, for the defendant to overhaul and repair said steamers in preparation for operation during the coming season, but that defendant, following its expressed intention to abandon said route, will not prepare said steamers for their usual and customary transportation service; that it is the duty of defendant, both at common law and under the federal statutes, including the Interstate Commerce Act, to provide and furnish such transportation during 1921 and thereafter, over said route, as has been its usual custom in the past; that plaintiff has heretofore filed a petition, similar to its present bill, with the Interstate Commerce Commission, but that said Commission has ruled that it has no jurisdiction in the premises; and that this bill is filed also on behalf of all other persons and corporations who may desire to intervene herein.

The specific relief prayed includes an order requiring defendant to furnish proper and suitable transportation for passengers and property during its navigation season of 1921 and thereafter over said Detroit and Mackinac route according to its past custom, an injunction restraining the defendant from discontinuing such transportation over said route, and a mandatory injunction
33 requiring the defendant to prepare its said steamers for service on said route during the ensuing season of navigation in accordance with its past custom.

The defendant has filed a motion to dismiss the bill of complaint, alleging that it appears from said bill (1) that this court is without jurisdiction in the premises; and (2) that the plaintiff is not entitled to the relief prayed. These two objections will be considered in the order named; the allegations of fact contained in the bill being, of course, accepted as true for the purposes of the motion to dismiss."

The jurisdiction of the district court, as a court of the United States, to entertain the bill was sustained on the ground that plaintiff's contention that relief was affordable under the Interstate Commerce Act was not so unsubstantial and unreasonable as to be frivolous and merely colorable. Upon the merits, however, the district court, while recognizing that a common carrier, while engaged in transporting freight and passengers over a given route, owes a duty, even in the absence of statute to that effect and as incidental to the occupation in which it is engaged, to receive and carry freight and passengers upon reasonable request therefor, without discrimination and on reasonable rates and charges; and while also recognizing that railroad companies are not permitted to discontinue at will the rendition of the transportation service for the performance of which they have been endowed with special privileges and powers,—was of opinion that navigation companies such as defendant are not forbidden, either by common law or by statute, to withdraw from such transportation, in whole or in part, by abandoning or suspending operation over all or any of their lines or routes. In this court, intervention, to the extent of filing briefs has been made by or on behalf of certain cities on the discontinued line, which cities it is claimed are injuriously affected by such discontinuance. There is

no averment in the bill of complaint that the City of Detroit, or any of the cities intervening in this action, are entirely without railroad service; or that plaintiff is without public service by water or by rail and water between Detroit and Mackinac Island during the navigation season.

Knappen, Circuit Judge: In our opinion the court below rightly maintained jurisdiction, as a court of the United States, over the case presented by the bill, and for the reasons assigned by the district judge. Louisville & N. Ry. Co. v. Rice, 247 U. S. 201, 203; 34 Greene v. Louisville & I. Ry. Co., 244 U. S. 499. We also assume, for the purpose of this opinion, that the bill does not show a lack of sufficient interest in the party complaining, especially as it is filed in the interest not only of plaintiff, but of others similarly situated.

Upon the merits, the case lies within narrow compass. It is undisputed that defendant was incorporated under the general Michigan statute of 1867,[1] which authorized such incorporation "for the purpose of engaging in the business of maritime commerce or navigation within this state, or upon the frontier lakes or other navigable waters, natural or artificial, connected therewith." This statute was superseded by the general incorporation statute of Michigan of June 18, 1903,[2] which includes corporations "for engaging in maritime commerce or navigation," and which continued in force all such corporations previously organized. Defendant's articles of incorporation, which constitute its charter, contain no designation or mention of the route or routes over which navigation was intended, nor did either of such incorporation statutes require such designation. Defendant is indisputably a common carrier by water, and as such is engaged in domestic and interstate commerce, and has been so engaged for more then 20 years. Being engaged in the operation of a public utility, it was and is subject to an enforceable obligation (and, we assume, even in the absence of statute or special contract, by franchise or otherwise) to supply on demand reasonable service in the transportation of passengers and freight over such lines as are at the time operated by it. No question of reasonableness of service as to any route under operation by defendant when this suit was instituted is here presented. The sole question before us is whether, either by common law or by statute (federal or state) defendant is forbidden to cease or suspend navigation over a given route over which it has previously operated,—because such cessation entails inconvenience or hardship upon the public previously served by such utility.

In our opinion such suspension or discontinuation of service upon one or more, or all, of the routes theretofore navigated is not forbidden by the common law under circumstances such as exist here. None of the numerous decisions which assert the power of the courts to prevent suspension or discontinuance by a railway company of its rail lines, in whole or in part, have, so far as we

[1] Act No. 24, approved Feb. 21, 1867, Chap. 181, Mich. Comp. Laws, 1897.
[2] P. A. Mich. 1903, Act No. 232; Mich. Comp. Laws, 1915, C. 175.

35 are advised, had any relation to navigation companies.[3] So far as decisions denying the right of a railroad company to abandon its lines or tracks may be thought to rest upon common law principles, unaided by statute, an exception, upon principle, of navigation companies such as defendant may well be found in the absence of contract, express or implied, for operating upon a given route, in connection with the lack of privileges such as
36 eminent domain, as applied either to lines of travel (unnecessary upon the open seas) or to the acquisition of dock

[3] Prominent among the cases relied on by plaintiff or intervenors are Central Transportation Co. v. Pullman's Car Co., 139 U. S., 24, where it was held that a lease by the plaintiff (which was chartered for "the transportation of passengers in railroad cars constructed and to be owned by said company") of all its cars to defendant for 99 years, with agreement not to engage in the business of manufacturing, using or hiring cars during the life of the contract, was ultra vires, the court saying (pp. 50-51) that "the plaintiff exercised a public employment, and was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers, owes to the public, independently of possessing any right of eminent domain." (Plainly, this decision is not opposed to the conclusion we have announced above.) Interstate Commerce Commission v. Transit Co., 224 U. S. 194, where it was held that carriers partly by railroad and partly by water, under a common arrangement for a continuous carriage, are within the Interstate Commerce Act, and so subject to the provisions of the act authorizing the commission to require a system of accounting. (Neither this nor either of the following decisions cited in this note throw light upon the common law rule.) Chesapeake & Ohio Railway Co. v. Public Service Commisson, 242 U. S. 603, where it was held, following the Supreme Court of Appeals of West Virginia, that a law of that state which declared that "railroads" shall be public highways "free to all persons for the transportation of their persons and property" embraces a branch line constructed and operated under it, and imposes on the carrier with respect to such line a continuing franchise obligation to transport passengers as well as freight; and that such obligation may be enforced by state action, although the carrier has long operated the branch in freight traffic only and never in any other. Grand Trunk Ry. Co. v. Michigan Ry. Commission, 231 U. S. 457, where an order of the State Commission requiring certain railroads doing an interstate business to use their tracks within the limits of a city for the interchange of intrastate traffic was sustained as being within the regulating power of the commission, the court remarking (p. 473) that to certain controlling conditions previously mentioned there must be added: "the fact that the railroad itself for a long period of time had recognized the situation, and had applied the tracks to uses of transportation in the proper sense as dstinguished from mere terminal service, a use which was only abandoned or sought to be abandoned when authority was exercised to prevent unreasonable and to secure reasonable charges for the services." Terminal Taxicab Co. v. District of Columbia, 241 U. S. 252, where it was held that in determining whether a corporation is or is not a common carrier the important thing is what it actually does, and not what its charter says it may do. Gasser v. Garden Bay R. R. Co., 205 Mich. 5, where it was held that a railway company, having been incorporated under the laws of the state as a common carrier, and having secured permission from the Railroad Commission to issue stock, and having entered upon the operation of its line under an implied duty to the public to continue its operation as a public service corporation, could not thereafter arbitrarily abandon operations permanently, discontinue the assumed service and dismantle the road, without the consent of the state through its constituted authority. The syllabus in Hocking Valley R. R. Co. v. The Public Utilities Commission of Ohio, 92 O. St. 9, which represents the decision of that court, contains nothing specially pertinent to the proposition we are considering.

and wharf facilities, as well as with the common practice of navigation companies to go out of business altogether or to change routes and service from time to time, as the interests of the navigation company may dictate. But whatever may be the reason, the fact that the existence of the common law power asserted by plaintiff has not heretofore been judicially declared is highly significant.

It is not apparent that the situation is at all changed by the fact that defendant, in common with navigation companies generally, is by the Michigan statute (P. A. Mich. 1911, No. 70, April 13, 1911) subject to a tonnage tax in lieu of general property taxes—in practice much larger than the tonnage taxes; nor by the fact that defendant has in previous years found the Mackinac line profitable, and that the operation of defendant's lines, taken as a whole, is profitable.

It remains to consider whether the power asserted by plaintiff has been conferred upon the courts by statute. We think it clear that there is no such federal statute. True, by sub-section 1 (*a*) of the Interstate Commerce Act, as amended (Act Feb. 28, 1920, 41 Stat. C. 91, p. 456; as amended by Act June 5, 1920, C. 235, 41 Stat. 945), the act is made applicable to transportation "partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;" and, by sub-section 1(*b*), to the transportation of commodities generally "partly by railroad or by water;" and, by sub-section 3, transportation is made to include "vessels;" and, by sub-section 4, it is made the duty of every common carrier subject to the act, engaged in the transportation of passengers or property, to furnish such transportation upon reasonable request therefor. We agree with the district court that the addition, under the amendment of 1920, of the words "engaged in the transportation of passengers or property" has not increased or altered the nature or extent of the duty imposed upon the common carriers to which it applied. Not only do we find in these provisions of the Interstate Commerce Act no inhibition upon a carrier by water to suspend or discontinue its route or routes in whole or in part (defendant is not a carrier by rail, except in the sense that it carries by water under joint tariffs, rates and arrangements with rail carriers), but any implication of such inhibition is to our minds plainly repelled by sub-
section 18 of the amended act, which provides that "no
37 carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." This inhibition, directed alone to the "carrier by railroad," indicates, we think, a legislative intent to exclude from its effect carriers by water. We have no doubt the Interstate Commerce Commission rightly disclaimed jurisdiction to act in the premises upon plaintiff's request.

We think it equally clear that no Michigan statute confers upon the courts any authority to restrain the suspension or discontinuance of service over the route in question. The statute of 1919 (P. A. Mich. 1919, No. 56, April 10, 1919) forbids a common carrier by

railroad to "abandon its main line of track, or tracks, or any portion thereof, or remove or close any of its main line track, or tracks, except for the purpose of repairing the same or altering the line of the track, except by permission of the Michigan Railroad Commission in accordance with the provisions hereof." It is significant that this statute contains no mention whatever of common carriers by water, and discloses, we think, an express legislative intent not to include them.[4] Since the instant suit was brought the legislature of Michigan has passed an act "to regulate the service, rates, fares and charges of carriers by water within this state," which act provides for investigation by the State Public Utilities Commission[5] of any complaint "against any rate, fare, charge or tariff of any carrier by water within this state, or against any rule, regulation or service of such carrier, or against the neglect, failure, or refusal of any such carrier to * * * observe or perform any rate * * * rule * * * or service," with authority to regulate the performance or observance of such "rate, fare, charge or tariff, and any rule, regulation or service," with power to "prescribe the same to
38 be observed by such carrier" (P. A. Mich. 1921, No. 246, May 18, 1921). It is matter of public information that the Michigan Public Utilities Commission has held that it has jurisdiction over some features, at least, of applications to compel resumption of service on the line in question. It scarcely need be said that the existence of such power in the Commission confers no authority upon the courts to furnish the relief asked by the bill in this cause.

The order of the district court dismissing the bill of complaint is affirmed.

39 **CLAIM OF APPEAL.**

[Filed Jan. 4, 1923.]

Now comes the plaintiff and appellant William Lucking, and claims the benefit of an appeal to the Supreme Court of the United States from the decree of the Circuit Court of Appeals of the United States for the Sixth Circuit, entered therein on the 7th day of Novem-

[4] In view of this situation there is little, if any, significance in the fact that by the earlier statute creating the Michigan Railroad Commisson (P. A. Mich. 1909, Act 300; 2 C. L. Mich. 1915, C 155, secs. 8109 et seq.) the term "common carriers" is made to include those engaged in "the transportation of passengers and property wholly by rail or partly by rail and partly by water;" that the term "transportation" includes "all instrumentalities and facilities of shipment" (sec. 8111), and that every common carrier is required to furnish "reasonably adequate services and facilities" and to "provide and furnish transportation of passengers and property upon reasonable requests therefor" (sec. 8112).

[5] The Michigan Public Utilities Commission was created by Act No. 419, May 15, 1919, and thus subsequent to the act before referred to, relating to the abandonment by a common carrier by railroad of any of its tracks except by permission of the Michigan Railroad Commission. The latter commission was abolished by the act creating the Michigan Public Utilities Commission.

ber, A. D. 1922; and thereupon the appellant files herewith his assignment of errors on appeal and prays this court to allow this appeal and approve the bond filed herewith.

Dated December 29th, 1922. Wm. Lucking.

(Lodged with me this 3rd day of January 1923. Loyal E. Knappen, Circuit Judge).

40 **ASSIGNMENTS OF ERROR.**

[Filed Jan. 4, 1923.]

Now comes the appellant in the above entitled cause, William Lucking, and files his assignments of error in the above cause, and says that in the giving of the decree herein of the United States Circuit Court of Appeals for the Sixth Circuit, there is manifest error in this, towit:

(1) That the court erred in dismissing the bill of complaint, as amended.

(2) That the court erred in failing and refusing to grant the relief prayed for by the bill of complaint, as amended.

(3) That the court erred in not holding that defendant was a common carrier of passengers and freight on its Mackinac
41 route, and as such was charged with the duty of affording reasonable and adequate service and facilities to the plaintiff and the public.

(4) That the court erred in not holding that defendant, since it derived a profit on its whole business, was obliged to give and afford reasonable and adequate service and transportation facilities for the transportation of freight and passengers over its Mackinac Route.

(5) That the court erred in not holding that the defendant was under such duty to afford and render adequate and reasonable service and transportation facilities at the common law.

(6) That the court erred in not holding that the defendant was under such duty by reason and virtue of the Statutes of the State of Michigan.

(7) That the court erred in not holding that the defendant was under such duty by reason and virtue of the Acts of Congress known as the Interstate Commerce Act and amendments thereto.

(8) That the court erred in not holding that the defendant was as much a common carrier and under the same duties to furnish transportation facilities and service as a common carrier by railroad.

(9) That the court erred in not directing a hearing of
42 the case in the lower court on the merits and the taking of full proofs to determine the public necessity for the operation of defendant's steamers on its Mackinac Route and whether a reasonable and adequate return would be afforded defendant for such service. Wm. Lucking, Plaintiff and Appellant.

(Lodged with me this 3rd day of January, 1923. Loyal E. Knappen, Circuit Judge.)

BOND ON APPEAL.

[Filed Jan. 4, 1923.]

Know all men by these presents, that we, William Lucking, as principal, and Harold W. Hanlon, as surety, are held and firmly bound unto the Detroit & Cleveland Navigation Company, a corporation, in the full sum of three hundred dollars, to be paid to the said company its successors and assigns; to which payment well and truly to be made the said principal and the said surety bind themselves, their heirs, administrators and assigns, jointly and severally by these presents.

Sealed and dated this 29th day of December one thousand
43 nine hundred and twenty-two.

Whereas, on November 6, 1922, at a session of this court in a suit pending in said court, between the said William Lucking, plaintiff, and Detroit & Cleveland Navigation Company, a corporation, defendant, a decree was rendered against the said plaintiff and in favor of said defendant, and the said plaintiff, having obtained from said court an order allowing an appeal to the Supreme Court of the United States to reverse the decree in the said suit, and a citation directed to the said defendant being about to be issued, citing and admonishing them to be and appear at a session of the said Supreme Court of the United States to be held at Washington, D. C.

Now, the condition of the obligation is such, that if the said William Lucking shall prosecute his said appeal to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation is to be void; otherwise to remain in full force and effect. Wm. Lucking. Harold W. Hanlon.

This bond is approved as to form, amount and sufficiency of sure-
ties. Loyal E. Knappen, Circuit Judge.
44 Dated this 3rd day of January, 1923.

(Lodged with me this 3rd day of January, 1923. Loyal E. Knappen, Circuit Judge.)

ORDER ALLOWING APPEAL AND APPROVING BOND.

[Filed Jan. 4, 1923.]

On reading and filing appellant's claim of appeal to the Supreme Court of the United States, with assignment of errors and bond on appeal in behalf of the above defendant it is hereby

Ordered that the said bond for costs on appeal be and it is hereby approved, and it is

Further ordered that the said appeal be and the same is hereby allowed.

Dated this 3rd of January, 1923. Loyal E. Knappen, U. S. Circuit Judge.

(Lodged with me this 3rd day of January, 1923. Loyal E. Knappen, Circuit Judge.)

45 [Title omitted.]

CITATION AND SERVICE.

[Filed Jan. 18, 1923.]

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Detroit & Cleveland Navigation Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to an appeal duly allowed in the cause heretofore pending in the said The United States Circuit Court of Appeals for the Sixth Circuit wherein William Lucking is the plaintiff and appellant and you, the said Detroit & Cleveland Navigation Company, are the defendant and appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in the said appeal mentioned, should not be corrected and full and speedy justice done to the parties in that behalf.

Witness my hand and seal at the City of Grand Rapids, State of Michigan, this 3rd day of January, 1923. Loyal E. Knappen, Judge of the United States Circuit Court of Appeals for the Sixth Circuit. Attest: Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

46 Due and timely service of the within citation on appeal in the within named cause is hereby acknowledged on behalf of the Detroit & Cleveland Navigation Company, the within named defendant and appellee.

Detroit, Michigan, January 11th, 1923. Angell, Turner & Dyer, Attorneys for Defendant & Appellee.

47 [Endorsement omitted.]

48 **PRAECIPE FOR RECORD.**

[Filed Jan. 30, 1923.]

The undersigned plaintiff desires the following pleadings and papers printed in the printed record on appeal in this cause, namely:

(1) Bill of Complaint.
(2) Defendant's Motion to dismiss Bill of Complaint.
(3) Opinions of District Court (2).
(4) Opinion of Court of Appeals.
(5) Decree of United States Circuit Court of Appeals.
(6) Claim of Appeal to Supreme Court.
(7) Bond on Appeal.
(8) Assignments of Error.

(9) Order allowing appeal and approving bond.
(10) Citation. Wm. Lucking.

The Detroit & Cleveland Navigation Company, Defendant and Appellee, desires no further portions of the record to be included in the transcript of the record on appeal to be returned to the Supreme Court of the United States. Angell, Turner & Dyer, Attorneys for Defendant and Appellee.

49 United States Circuit Court of Appeals for the Sixth Circuit.

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in accordance with præcipe filed in the case of William Lucking vs. Detroit & Cleveland Navigation Company, No. 3625, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this — day of January, A. D. 1923. [Seal of the United States Circuit Court of Appeals, Sixth Circuit.] Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, by E. C. Klein, Deputy Clerk.

Endorsed on cover: File No. 29,376. U. S. Circuit Court Appeals, 6th Circuit. Term No. 826. William Lucking, appellant, vs. Detroit and Cleveland Navigation Company. Filed February 2d, 1923. File No. 29,376.

In The

Supreme Court of the United States

October Term, 1922.

No. 826. 212

WILLIAM LUCKING,
Plaintiff and Appellant,

v.

DETROIT & CLEVELAND NAVIGATION COMPANY,
Defendant and Appellee.

BRIEF FOR APPELLANT.

WILLIAM LUCKING,
Plaintiff and Appellant.

Mich. Brief & Record Co., 4429 Field Ave., Detroit, Mich.

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Cases Cited.

In The

Supreme Court of the United States

October Term, 1922.

No. 826.

WILLIAM LUCKING,

Plaintiff and Appellant,

v.

DETROIT & CLEVELAND NAVIGATION COMPANY,

Defendant and Appellee.

BRIEF FOR APPELLANT.

The lower courts dismissed the bill of complaint filed to enjoin defendant from discontinuing its boat service of thirty years' standing over its well known Detroit to Mackinac Island Route.

Defendant, by its motion to dismiss, admits that it has the facilities with which to perform this service—that it is a common carrier—that this service is necessary to the public and the different ports on Lake Huron—and that it performs this service at a profit.

Defendant, however, took the position, in effect, in the lower courts that, being a carrier by water, it owed no duty to the public whatever—and could, in a word, operate its vessels over a given water route for thirty years, performing regularly a necessary transportation service for whole towns and communities and then suddenly abandon this route.

Its regular steamers, City of Alpena II and City of Mackinac II, were tied to the docks in Detroit and this territory has since been without this necessary transportation service.

The District Court sustained defendant in its contention (R., 11-18), opinion *273 Fed., 577*, and plaintiff appealed to the Court of Appeals for the Sixth Circuit, which affirmed the decree of the District Court. For its opinion, see *284 Fed., 497*, and record pages 19 to 25.

THE FACTS.

The averments of the bill being taken as true on a motion to dismiss, it is therefore admitted:

(a) That the defendant is a common carrier for hire and engaged in both interstate and intrastate transportation of passengers and property on the Great Lakes.

That it has carried on such business for thirty years or more over well known and defined routes between Detroit and Buffalo, Detroit and Cleveland, and Toledo, Ohio and Detroit, Michigan to Mackinac Island and St. Ignace. (Bill of complaint, Par. 3).

(b) That it is a common carrier, partly by railroad and partly by water, being engaged in the continuous interstate transportation of freight and passengers from points on different railroads to and from points on its routes.

That defendant intends to and will carry on its general business as a common carrier during the season of 1921 and thereafter and will derive a large profit from such business (Pars. 4, 5).

(c) That its Detroit to Mackinac Island Route is one of the most popular and largely traveled routes on the Great Lakes. That it has maintained for years over this route a regular four trip per week service by its steamers, Alpena II and Mackinac II, and has carried over this route tens of thousands of passengers and hundreds of thousands of tons of freight (Par. 6).

(d) That it has made large profits on its capital invested in this business and has availed itself of the many costly harbor improvements maintained by the United States.

That in 1919 its profits on its business equalled 25% after all Federal and other taxes had been paid.

That defendant has made a large net profit in the past on its business over its Detroit to Mackinac Route (Par. 7).

(e) That many of the ports and cities of Lake Huron were developed and built up in part by, and depend upon this transportation service of defendant, and that large amounts of the products of these ports and cities on Lake Huron are carried regularly on its steamers (Par. 8).

(f) That plaintiff has been a passenger and shipper of goods in the past and intends to use said boats in the future (Par. 9).

(g) That defendant is discontinuing said Detroit to Mackinac service because of dissatisfaction with the Seamen's Act and intends to abandon this route and leave the territory served by its steamers without such transportation facilities (Par. 10).

(h) That the bill of complaint is filed on behalf of all other persons who may desire to intervene (Par. 14).

The prayer of the bill is that the defendant be compelled by this court to operate its steamers Alpena II and Mackinac II on said Detroit to Mackinac Route as has been its custom and usage in the past, and with rates and charges upon a reasonable and fair basis.

Upon the hearing on appeal, the cities of Alpena, Har-

bor Beach and Cheboygan, obtained permission to appear and be heard on briefs in support of the bill of complaint.

It is to be noted that no service is asked of this defendant which it has not given for the last twenty or thirty years to this territory.

That no request is made for additional facilities or expenditures of money for additional boats or equipment of any kind.

The lower court was asked to compel defendant to operate its steamers as usual and to not permit it to arbitrarily and without reason deprive this territory of the transportation facilities upon which it depends and upon which it was built up in the past.

And the bill avers that defendant could perform this service and does perform it at a profit, and that its entire business brings it in a large and handsome return on its investment.

QUESTIONS PRESENTED.

The case presents a question of great public importance involving as it does the right of the general public to have maintained a necessary and very important carrier service by water.

It involves the question whether obligations and duties held by this court applicable to common carriers generally, are to be applied to common carriers by water or whether such carriers are in a class by themselves and thus relieved from performance of the usual duties of a carrier to the public.

The plaintiff, and the intervening cities on Lake Huron, contended that since the defendant had for over thirty years operated its vessels over a well established route upon Lake Huron and under regular schedules.

And since by such regular service communities had been built up and a public necessity for such service created.

And since defendant's general business returned it a handsome profit, which it continued to derive from its regular routes upon Lake Erie from Detroit to Cleveland and Detroit to Buffalo.

That it could not arbitrarily abandon its established route from Detroit to Mackinac Island and all service thereon, which was necessary to the public and for which it had adequate facilities.

It is submitted that the question presented is one of

vital importance to the public, not only of Michigan and surrounding territory, but also of the country at large.

It presents to this court the question whether common carriers by water are to be held to the same duties and obligations as those pertaining to other common carriers, such as railroads.

Judge Knappen, in delivering the opinion of the Court of Appeals, said:

> "It is undisputed that defendant was incorporated under the general Michigan Statute of 1867, which authorized such incorporation 'for the purpose of engaging in the business of maritime commerce or navigation within this state, or upon the frontier lakes or other navigable waters, natural or artificial, connected therewith.' * * * Defendant's articles of incorporation, which constitute its charter, contain no designation or mention of the route or routes over which navigation was intended, nor did either of such incorporation statutes require such designation. Defendant is indisputably a common carrier by water, and as such is engaged in domestic and interstate commerce, and has been so engaged for more than 20 years. Being engaged in the operation of a public utility, it was and is subject to an enforceable obligation (and, we assume, even in the absence of statute or special contract, by franchise or otherwise) to supply on demand reasonable service in the transportation of passengers and freight over such lines as are at the time operated by it. No question of reasonableness of service as to any route under operation by defendant when this suit was instituted is here presented. The sole question before us is whether, either by common law or by statute (federal or state) defendant is forbidden to cease or suspend navigation over a given route over

which it has previously operated—because such cessation entails inconvenience or hardship upon the public previously served by such utility'' (R., 22).

A determination of the case involves consideration of three questions, namely:

(1st) Whether defendant is within the terms of the Interstate Commerce Act and Amendments and what if any duties to serve the public are imposed upon it thereby.

(2nd) Whether defendant is under any duty at common law to maintain a necessary service over an established route.

(3rd) Whether defendant is under such duty by virtue of any of the statutes of the state of Michigan.

ARGUMENT.

POINT I.

This Court May Grant Plaintiff Full Relief—Whether the Right Thereto is Based Upon the Provisions of the Interstate Commerce Act or Upon the Common Law Right to Compel a Carrier to Perform Its Duties, or Upon a Statute of Michigan.

Greene v. Railroad Company, 244 U. S., 499.
Siler v. Louisville, Etc. R. R. Co., 213 U. S., 175, 191.
Ohio Tax Cases, 232 U. S., 576, 586.

POINT II.

A Common Carrier By Water is Charged With the Same Obligations and Duties as Any Other Carrier.

The Maggie Hammond, 9 Wall., 435, 460.
The Lady Pike, 21 Wall., 1, 14.
The Niagara v. Cordes, 21 How., 7, 23.
Citizens Bank v. Nantucket Steamboat Co., 2 Story, 16, Federal Cases No. 2730.

POINT III.

The Defendant is a Common Carrier, Partly by Railroad and Partly by Water, Within the Meaning of the Interstate Commerce Act, and is as Specifically Within the Terms of That Act as Any Other Carrier Named Therein.

Interstate Commerce Commission v. Goodrich Transit Company, 224 U. S., 194, 207.

In *Interstate Commerce Commission v. Goodrich Transit Company, supra,* Mr. Justice White in delivering the opinion of this court said:

> "The first section makes the act apply alike to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water under an arrange-

ment for a continuous carriage or shipment. It is conceded that the carriers filing the bills in those cases were common carriers engaged in the transportation of passengers and property partly by railroad and partly by water under a joint arrangement for a continuous carriage or shipment. Such common carriers are declared to be subject to the provisions of the act in precisely the same terms as those which comprehend the other companies named in the act. Carriers partly by railroad and partly by water under a common arrangement for a continuous carriage or shipment are as specifically within the terms of the act as any other carrier, named therein."

It is of interest that in the *Goodrich case, supra,* counsel's contention that vessel companies were not subject to the act for any purpose (see pages 199 and 202) was disposed of by this court at bottom of page 207 of its opinion.

The provisions of the Interstate Commerce Act apply to many different kinds of common carriers.

Pipe line companies are within the act.

The Pipe Line Cases, 234 U. S., 548.

Telephone and telegraph companies are within the act.

Stevens v. Telephone Co., 240 Fed., 759.

To terminal companies, even though they are wholly within one state.

United States v. Union Stockyard, 226 U. S., 286.
Penn. Co. v. United States, 236 U. S., 351.

To steamship companies, which participate in continuous shipment of freight by arrangements with railroads.

Interstate Commerce Commission v. Transit Company, supra.
Alaska Steamship Co. v. Assn., 236 Fed., 964.

POINT IV.

That the Defendant Steamship Company is Clearly Within the Terms of the Interstate Commerce Act is Shown by the Different Amendments to the Act.

The present act provides:

> "(1) That the provisions of this act shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or * * *
>
> (3) * * * Wherever the word 'carrier' is used in this act it shall be held to mean 'common carriers' * * * *the term 'transportation' as used in this act* shall include locomotives, cars and other vehicles, *vessels* and all instrumentalities and facilities of shipment or carriage."
>
> *Interstate Commerce Act, as amended by the Act of February 28, 1920.*

Section 3, *supra,* was amended recently so as to include the term "vessels."

The word "transportation" is of importance in construing the act.

> *Penn. Co. v. U. S., 236 U. S., 351, 363.*

Section 4 of the Interstate Commerce Act provides that:

> * * * "(4) It shall be the duty of every com-

mon carrier subject to this act engaged in *the transportation of passengers or other property* to provide and furnish such *transportation upon reasonable request therefor.*"

These provisions of the act apply to a coast wise steamship company or lake carrier within the United States and compel it to furnish adequate facilities for transportation of passengers and freight.

Alaska Steamship Company v. Longshoremen's Association, 236 Fed., 964, 971.

The Interstate Commerce Act was originally directed entirely against practices of discrimination.

Act of February 4, 1887 (24 U. S. Stats., 379).

Then by amendment of June 29, 1906, a provision directing rendition of transportation service upon reasonable request was added—see:

34 Stats., 584, Sec. 1 end of 2nd Paragraph.

This provision has been commented on by this court in:

Chicago Ry. v. Elevator Co., 226 U. S., 426, 434.
Ellis v. I. C. C., 237 U. S., 434, 443 (first syl.).

Thereafter this provision was rearranged as Subdivision 4 of Section 1 of this act. See *41 Stats., 474,* amendment of February 28, 1920.

The provisions of the Interstate Commerce Act do not apply, however, to ocean carriers transporting goods to foreign countries.

Pacific Steamship Co. v. Railroad Co., 251 Fed., 218 (9 C. C. A.).

POINT V.

Common Carriers Are Often Compelled to Operate Branch Lines Where the Public Necessity Therefor Appears.

The bill avers that this necessary service can be rendered without loss and this, of course, is taken as true. It also avers that the defendant is making large returns on its capital and several times what is earned by an ordinary carrier by railroad.

But even though some slight loss was made on this Mackinac Route, since defendant admits that on all its business it makes a considerable profit, it has no legal right to abandon this service, for the public necessity therefor is also admitted.

> *Chesapeake & Ohio Railroad Co. v. Commission, 242 U. S., 603, 607.*
> *Atlantic Coast Line v. Commission, 206 U. S., 1-24.*

In *Chesapeake & Ohio Co. v. Commission, supra,* an order requiring the railroad company to run two passenger trains each day upon a branch on which no passenger service had ever been had, although such trains would be run at a loss, was sustained.

The Supreme Court in laying down the rule to be followed in all cases said:

> "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment

of the powers and privileges granted by the state and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. *Atlantic Coast Line Railroad Co. v. North Carolina Corporation Commission, 206 U. S., 1, 26; Missouri, Pacific Ry. Co. v. Kansas, 216 U. S., 262, 279; Oregon Railroad & Navigation Co. v. Fairchild, 224 U. S., 510, 529; Chicago, Burlington & Quincy R. R. Co. v. Wisconsin Railroad Commission, 237 U. S., 220, 229.* That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered are also to be considered. Cases *supra.* Applying these criteria to the order in question, we think it is not shown to be unreasonable."

And see:

Colorado Co. v. Commission, 54 Colo., 64; 129 Pac., 506.
State. v. R. R. Co., 53 Kan., 377; 36 Pac., 747.
Southern Company v. Franklin Co., 96 Va., 693; 32 S. E., 485.
People v. Albany R. Co., 24 N. Y., 261.
Southern R. R. Co. v. Hatchett, 174 Ky., 463; L. R. A. 1917-D, 1105.

Defendant having been incorporated as a common carrier by the state of Michigan—with power to own and hold property for that purpose—and

Having exercised its corporate powers and privileges to that end for a great number of years, and having operated its steamers over its Detroit to Mackinac Route for over thirty years, and

Now continuing to exercise its corporate franchises on its Detroit to Cleveland and Detroit to Buffalo Routes, we submit:

It cannot arbitrarily abandon its customary service on the Mackinac Route and thus avoid its implied duty to the public, and for which there is a public necessity.

It is of no consequence that defendant's charter is what is sometimes referred to as "permissive" and does not contain express stipulations in so many words requiring operation of its steamers on this Mackinac Route.

Common carriers must operate branch lines, where public necessity requires, *even though there is no statute or charter provision*—the route having been laid out voluntarily by the carrier and the service given for a long period of years.

Gasser v. Railroad Company, 205 Mich., 5.

In *Gasser v. Railroad Company, supra,* it was held by the Supreme Court of Michigan, that a railroad company, having been incorporated as a common carrier, and having entered upon the operation of its line under the implied duty to the public to continue its operation as a public service corporation, could not, thereafter, arbitrarily abandon operations, permanently discontinue the assumed service, and dismantle the road without the consent of the state through its constituted authority.

The court in its opinion by Mr. Justice Steere, said:

> "It is urged in behalf of the people of Garden township that because the township granted a franchise as described in the court's findings to the lumber company which constructed the road, the defendant railway company as assignee, is thereby obligated to continue its operation during the franchise period. The conclusions of the trial court in rejecting this contention are supported in facts by the

record and the reasons therefor well stated as follows:

'There is no language in the franchise from which an undertaking on the part of the grantees thereof to construct or to operate such railroad can be found expressly or by implication. In the construction of the road, no right or privilege granted by the franchise was exercised. Except where it crosses certain highways, the road was not laid on or in any highways, streets, alley or public place of Garden township, and the highway crossings were not, it is claimed, made under the terms of the franchise but under arrangements between the lumber company and the township outside the franchise.'

The Garden Bay Railway Co. having been incorporated under the laws of the state as a common carrier, secured permission from the railroad commission to issue stock and entered upon the operation of its line under the *implied duty to* the public *to continue its operation as a public service corporation.* It could not, thereafter, in less than 18 months after its last hearing before the commission relative to its stock issue, arbitrarily abandon operations, permanently, discontinue the assumed service and dismantle the road *without the consent of the state through its constituted authority.*

We need not review the many authorities cited or discuss the arguments represented by counsel on the varying phases of that subject, for the law is well recognized that the state can and generally will, when possible, enforce the continuous exercise of such granted corporate powers for public service and benefit, even though unprofitable or at a loss to the corporation, except under special circumstances where peculiarly equitable considerations justly warrant permitting abandonment."

And see:

Grinsfelder v. Spokane Ry. Co., 19 Wash., 518; 41 L. R. A., 515.

Hocking Valley Co. v. Commission, 92 Ohio St., 9, L. R. A. 1918-A, 267.
State v. Bullock, 78 Fla., ..; 82 So., 866.
Bryan v. L. & N. R. R. Co., 244 Fed., 650, 654.

In *Hocking Valley Company v. Commission, supra,* the Supreme Court of Ohio, in its opinion said:

> "It is not shown that there is any special franchise provision or any contract by which the defendant expressly agreed to render the service in question. Therefore, the order of the commission must find its validity, if at all, by reason of the fact that the defendant is a public utility, incorporated and organized under the laws of the state, and that, while exercising the rights and privileges accruing to it as such, it has by its acts and conduct created the situation found by the commission to exist; and that from this situation a duty is imposed upon it which it cannot disregard in the absence of such a showing on its part as above indicated. * * *
>
> It is undoubtedly true that the question whether or not the interurban service is a paying service should be considered with respect to its bearing on the question whether the public necessities require such service. The presumption is that where there is such a condition and such demand for the service as to amount to public necessity the rendering of the service would not result in loss. The finding of the commission was that the defendant had not shown that the furnishing of the service will entail loss upon it, and the finding was that the public convenience, welfare, and necessity require the continuance of the service. * * *
>
> We are not constrained to think, however, that this rule should have conclusive effect in connection with the facts showing in this case. Here the public needs were created and grew up in view of the voluntary action of the defendant itself. The finding of the commission is that the public necessity still

exists. *An unusual and abnormal situation was developed under the lead of the defendant. The moving by the people away from central points to places scattered along the line of the defendant, and all of the things pointed out in the testimony and the findings, being done while the people relied upon the continuance of the voluntary service by the defendant, presents a situation which clearly estops it from invoking the rules above stated.*"

In *Bryan v. R. R. Co., supra,* the Eighth Circuit Court of Appeals, said:

"We think it must be conceded that a railroad which has been constructed and operated for 40 years may not be relocated in the manner in which it is shown by the evidence the old line of the South & North was relocated, without legislative authority. *Brown v. Railway Company, 126 Ga., 248; 55 S. E., 24; 7 Ann. Cas., 1026; Railway Company v. Kirkland, 129 Ga., 552; 59 S. E., 220; Lusby v. Kansas City, Etc. R. Co., 73 Miss., 360; 19 South, 239, 36 L. R. A., 510.* In *Brown v. Railway Co., supra,* it was said: 'It is generally held that where a railroad company to which has been given the power to choose its particular route between designated termini, has exercised its discretion in this regard, its power of choice is exhausted, and it cannot subsequently change its location without express legislative authority. Thus a change cannot be made for reasons of convenience or expediency, or economy merely.' A great number of authorities are cited to support this statement of the law. In *L. R. A. 1915-A, 549,* it is said: 'The general rule seems to be that a railroad cannot abandon its road or branch, even though it may be operated at a loss, and cases which are apparently in conflict with this rule, will be found to have turned on special circumstances that warranted the decision.'"

And in *Wyman on Public Service Corporations, Vol. 1, Sections 305, 306,* the author says:

"Sec. 305. System constructed under permissive charter.

Where the charter which has been accepted is permissive merely, permitting the chartered company to construct the system as it has done, the cases are in irreconcilable conflict as to whether after such construction the accepting company is thereafter bound to continue the service or whether it may withdraw from a particular part of its present service. It is now probably the weight of authority that a company which has accepted public franchises cannot retain such of these rights as it pleases it to exercise, and refuse to regard the public interests as a whole. In the most elaborate case to this effect—*State ex rel. v. Spokane Street Railway Company*—the court ordered a resumption of service upon an abandoned branch line. Mr. Justice Reaves, concluding his elaborate opinion thus: 'Such corporations, then, may not, by their own acts, disable themselves from performing the functions, which were the consideration for the public grant. These rights, then, are held by the grantee, the holder of the franchise, as the agent and trustee for the sovereign power, and are in no sense private, but continue after, as well as before, the grant to be but a portion of the public interests. The absolute commercial and business necessity for permanence when established forbade, from the earliest years, the manifest impolicy of leaving this interest to the laws of supply and demand, which thus far have sufficiently supplied the community with hotels, mills, etc. And it is not in degree only that these franchises differ from mills and inns. The one is private property, the other is a public function, which originally resided in the government, and, when delegated to either persons or corporations still re-

tains the public use. Permanency in the service of the public in a reasonable manner is an essential duty in all such avocations.'

Sec. 306. Cases permitting partial withdrawal.

However, there are almost as many cases permitting a partial withdrawal where there is no charter provision making the continuance of every service undertaken requisite. This was the prevailing view until the latter part of the last century; the usual doctrine being simply that when the charter was permissive the continuance of any service was left to the discretion of the company. But of late years the cases permitting withdrawal from a part of the service undertaken have stated considerable qualifications upon this right. This modern law is best summarized in a recent opinion in Virginia by Judge Keith, holding that a railroad might discontinue service upon an unprofitable branch. 'It may be asked, is a corporation having constructed a road to be permitted to abandon its use at its pleasure? We answer that it is not to be apprehended that the corporation will abandon any part of its line, the operation of which is found remunerative in the present, or that is likely to become so in the future. Where the line of railway, taken as a whole, cannot be profitably maintained; where its operation, when discreetly and economically managed, is attended with loss, it is difficult to preceive how a court can, by mandamus or otherwise, compel its operation to be continued. If the loss is the result of improvident and unthrifty management, the court may, at the suit of those interested, take charge of it for the benefit of all concerned, and run it through the instrumentality of a receiver, but if the traffic of the road is really insufficient to support a wise and economical administration of its affairs there would seem to be no escape from its ultimate abandonment. Such cases are possible though rare. *It more frequently happens, however, that a part of the line*

becomes unprofitable, though the system as a whole may be valuable. In such an event the court will inquire, first as to the positive duties imposed by the charter, and compel their performance by appropriate remedies, *while with respect to those duties which were not imposed by the charter, but which have been assumed by the corporation under permissive grants of power, it will consider all the circumstances of the case, and if upon the facts it shall appear that the duty unfulfilled inflicts no particular injury or hardship upon those who* make the complaint, and that the service which they receive is under all the conditions reasonably adapted to their needs, while the performance of the duty would entail a burden and loss upon the company far in excess of any benefit conferred, and which might in its ultimate effect embarass or prevent the performance of other duties with respect to larger interests, and affecting a far greater number of citizens, the court will withhold its hands."

No one can be compelled to engage in business as common carrier—but if they do, they become subject to the duties of a common carrier—even though such duty is not imposed by statute or order of commission.

Missouri Pacific Co. v. Larabee Mills, 211 U. S., 612, 619.

This is not a case where the carriers' entire operations and service are at a loss and it seeks to surrender its franchises and go out of business.

Of course, under special circumstances a carrier may abandon operation, as in the cases of:

Bullock v. R. R. Commission, 254 U. S., 513, 521.
Iowa v. Trust Co., 215 Fed., 307 (8 C. C. A.).
State v. Jack, 145 Fed., 281 (4 C. C. A.).
Southern R. R. Co. v. Hatchett, supra.

But carriers by steamboat may not disregard the rights of the public.

Lee Steamers v. Packet Co., 277 Fed., 5, 9 (6 C. C. A.).

POINT VI.

That Defendant Enjoyed No Right of Eminent Domain From the State of Michigan, Does Not Relieve It From Its Duty to Afford the Public an Admittedly Necessary Transportation Service.

It was urged by counsel for the defendant company in the lower courts, and sustained, that a common carrier by water should not be required to fulfil its duties to the public. In other words, that the defendant carrier by water did not enjoy certain privileges which a carrier by railroad did—such as, for instance, the right of eminent domain—and therefore could not be required to adequately serve the public necessities, etc.

The lower courts' conclusion cannot be sustained, either upon principle or authority, we think, for

The charters of railroad companies do not generally purport to define every route or branch line it will operate from time to time; but

After a railroad company has operated for a length of time a certain route, it becomes charged with the duty to afford necessary transportation facilities over this route, not by virtue of its charter alone, but because it has held

itself out as a common carrier over this route to the public and to the adjoining communities (see *Gasser case, supra*).

Such a railroad company has by virtue of the very use it has devoted its property to (in such case its terminals, rails, ties, etc.) become a common carrier as to this route and the communities bordering it.

Now, upon what basis of reasoning or sound principle can it be said that a carrier by railroad, as, for instance, the Michigan Central Company over its Jackson to Grand Rapids branch, is any the more a common carrier with any greater duties than the defendant in this case over its Detroit to Mackinac Route, where—

Defendant has maintained a regular schedule almost to the hour of four regular trips a week for thirty years between the different ports on this route, and

With its boats stopping at the same towns—almost at the same docks—which it has owned and maintained for thirty years;

And keeping up its regular through service and connections with different railroads at the different terminals on this route.

The District Court in its opinion in this case said:

> "It is true that common carriers like railroad companies, which enjoy peculiar rights and powers at the hands of the state, are not permitted to discontinue at will, the rendition of the transportation services for the performance of which they have been endowed with such special privileges and powers. A railroad company is clothed by the state with special rights, franchises and privileges, including certain attributes of sovereignty itself, as, for example, the power of eminent domain. * * *

> The reasons however, which underlie and prompt the imposition of this duty upon common carrier railroad companies do not apply to common carriers such as the defendant. The latter holds no public franchise and enjoys no rights or privileges, other than are held by any private individual desiring to engage in the business of transporting freight and passengers by water. It cannot exercise the power of eminent domain."

And Judge Knappen in his opinion, said:

> "So far as decisions denying the right of a railroad company to abandon its lines or tracks may be thought to rest upon common law principles, unaided by statute, an exception, upon principle, of navigation companies such as defendant may well be found in the absence of contract, express or implied, for operating upon a given route, in connection with the lack of privileges such as eminent domain, as applied either to lines of travel (unnecessary upon the open seas) or to the acquisition of dock and wharf facilities."

This very contention was raised by counsel for the transportation company in the case of *Central Transportation Company v. Pullman Company, 139 U. S., 24, 50,* and very distinctly and emphatically disapproved by this court.

For counsel for the transportation company (quoting from page 29 of Volume 139 of the Supreme Court Reports) argued to this court that:

> "This case differs from *Thomas v. Railroad Company, 101 U. S., 71; Pennsylvania Railroad Co. v. St. Louis, Alton, Etc. Railroad Co., 118 U. S., 290, 307;* and *Oregon Railway Co. v. Oregonian Railway Co., 130 U. S., 1,* in that no privilege was conferred upon the Central Transportation Company, which required the performance of some duty as an equivalent. It never became a trustee for the public

to discharge a duty because of a privilege conferred. It was vested with a franchise to be a corporation, to use a seal, and to act without its members becoming individually liable, saving to a certain extent, for its debts. It was permitted to do nothing which could not be done by an individual. Its sole power was to manufacture cars under specified patents. It was in precisely the same position as that of a limited liability company, which is only permitted to do what may be done by individuals; which is not a corporation; but which, under the laws of Pennsylvania may use a common seal, and may act without its members being liable for its debts. * * * A railroad corporation, however, is only authorized to locate a road between certain termini. After it has located the same, its power further to locate is at an end. Its right-of-way, therefore, becomes absolutely necessary to the continuance of its railroad. There is, therefore, a very obvious reason for requiring that such property so necessary to the exercise of the *quasi* public franchise, shall not be disposed of. There is no such reason in the case of a manufacturing corporation, which may build or buy, as many mills as it may see fit.

The Central Transportation Company, though called a 'transportation company,' was, as we have said, a manufacturing corporation, with no right to transport, saving as the same resulted from its right to use the cars which it might manufacture. In selling or leasing such cars it exercised a right of ownership incidental to its right to manufacture, as much as was that to transport, and it violated no duty to the public such as it would have owed to it if it had acquired property under the right of eminent domain, or had been vested with a power to do some act for the public benefit, by legislative grant, which it was not competent for individuals to perform. * * * It is not open to any person other than the Commonwealth, to complain that a private corpora-

tion deserves a writ of ouster because of its non-exercise of its franchises. Of course, the case is different with a *quasi* public corporation; for there the public have a right to demand that the property which it has acquired under the right of eminent domain, shall be used for the benefit of those whose rights alone justified its grant. This right the court will make efficacious whenever a person in interest asks it so to do.

The distinction between *quasi* public and ordinary trading corporations, is one that is much more than hinted at in *Thomas v. Railroad Company, supra,* and is very clearly stated in the text books, and in many of the cases."

These contentions this court overruled in their entirety in the following language:

"The plaintiff, therefore, was not an ordinary manufacturing corporation, such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation. *Ardesco Oil Co. v. North American Oil Co., 66 Penn. St., 375; Treadwell v. Salisbury Manuf. Co., 7 Gray, 393.* But the purpose of its incorporation, as defined in its charter, and recognized and confirmed by the legislature, being the transportation of passengers, the plaintiff exercised a public employment, and *was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers owes to the public, independently of possessing any right of eminent domain.* The public nature of that duty was not affected by the fact that it was to be performed by means of cars constructed and of patent rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a *quasi* public corporation; and it must be so treated as regards

> the validity of any attempt on its part to absolve itself from the performance of those duties to the public the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. *Pickard v. Pullman Southern Car Co., 117 U. S., 34; York & Maryland Railroad v. Winans, 17 How., 30, 39; Railroad Co. v. Lockwood, 17 Wall., 357; Liverpool & Great Western Steam Co. v. Phoenix Ins. Co., 129 U. S., 397.*"

It therefore appears that the Pullman Car Company was held to the duties of a common carrier and required to furnish all necessary transportation facilities, *even though it did not have the right of eminent domain and other privileges usually enjoyed by a railroad company and even though it had no well defined route or right-of-way of its own.*

Moreover, its charter was what the defendant in the case at bar has referred to as permissive. The Pullman Company's charter in no way undertook to define or mark out the particular routes over which its cars were to run. Its charter simply gave it the right to engage in the "transportation of passengers in railroad cars," etc.

In this case, the defendant navigation company's charter gives it the right to engage in "the business of maritime commerce or navigation."

But a permissive charter, so-called, does not excuse full performance by a carrier of its duties to the public.

For instance, in *International Bridge Company v. New York, 254 U. S., 126,* it was held that a corporation, which had constructed a bridge over the Niagara River for railroad uses only, and whose charter permitted it to construct a bridge for foot and carriage uses also, could not complain of an act of the state of New York compelling it to construct the foot and carriage way.

We submit that it has long been considered that the very privilege of engaging in business as a common carrier places upon such persons as devote their property to that use the duty to properly perform such service.

Munn v. Illinois, 94 U. S., 113, 126.

The defendant regularly files its tariffs with the Interstate Commerce Commission and upon their approval, is granted, of course, the right to collect such freight and passenger rates from the general public.

The defendant has grown rich and powerful from the exercise of the privilege and right of carrying passengers and freight for hire.

Moreover, defendant Navigation Company enjoys a great privilege granted it by the state, namely, practical immunity from all taxation on its very valuable steamers.

Act No. 70 of the Public Acts of 1911 of Michigan provides that an owner of steam vessels "*engaged in the carrying of passengers * * * and freight * * * and employed in the navigation * * * of the Great Lakes,*" may pay into the state treasury twenty cents per ton net on the registered tonnage of his boats, and thereby such owner's vessels are exempt from all other taxation, either state, county or municipal.

This valuable privilege the defendant company receives the benefit of and pays into the state treasurer's office at Lansing on its vessels the following tonnage taxes:

Boat	Tonnage	Tax
City of Detroit III	3328	$665.60
City of Cleveland III	2403	480.60
Eastern States	1566	313.20
Western States	1566	313.20
City of Detroit II	1454	290.80
City of St. Ignace	1324	264.80
City of Alpena II	1282	256.40
City of Mackinac II	1277	255.40

It is readily apparent, therefore, that the state of Michigan grants to this company practical immunity from taxation on its three million dollars or more of vessels in return for its engaging in the business of carrying passengers and freight on the Great Lakes.

Under this act the defendant only has to pay annually in taxes on its vessels the sum of $2,840.

If it were not for this valuable privilege granted by the state to this defendant, these vessels would be taxed as personal property at the city of Detroit, and being worth upwards of $3,000,000.00 and the city and state and county tax rate at Detroit being $25.00 a thousand approximately, the defendant company would pay annually in taxes at least $75,000.

And it is significant that the company's steamers, City of Alpena II and City of Mackinac II, which are worth at least $250,000.00 apiece and would therefore, otherwise pay a tax of about $12,500 a year, now escape taxation except this tonnage tax amounting to $511.80 on both vessels. And $12,000.00 was saved in taxes in this way on these two boats during the year 1921 although defendant did not use them as common carriers, but kept them tied to the docks in Detroit and left the communities and public along Lake Huron to suffer the consequences.

POINT VII.

The Public Importance and Necessity For This Service Cannot Be Doubted.

The cities of Alpena and Cheboygan filed their brief with the Court of Appeals, stating in part that:

"Commencing in February, 1921, various articles in the public press announced that the Detroit & Cleveland Navigation Company would discontinue its usual service of over thirty years on its well known Detroit to Mackinac Route until such time as Congress should pass certain amendments to the 'Seaman's Act.'"

The Navigation Company had regularly operated its steamers City of Alpena II and City of Mackinac II, from Detroit to Mackinac Island and St. Ignace and touching at Alpena, Cheboygan, Harbor Beach and other ports. The actual discontinuance of this service by defendant during the season of 1921 was wholly without the consent of these communities—which depended thereon—and without any permission or approval of the state.

Defendant's action was as arbitrary as it was abrupt.

And no effort whatever was made by the Navigation Company to provide any other service to take the place of this necessary and vital transportation facility, a service which this whole lake territory had received for over thirty years and upon which it relied almost entirely for its interport transportation necessities on Lake Huron and connecting waters.

Defendant's steamers were each year used by great numbers of the residents of these various lake ports as well as tens of thousands of summer tourists from other states. Great quantities of manufactured goods and perishable foods and farm products of these ports and the territory and communities surrounding them were daily shipped to the different cities reached by defendant's steamers.

The discontinuance of this valuable transportation service to the various ports of Lake Huron by the defendant during the season of 1921 had a very serious effect upon their business conditions and prosperity generally. Considerable financial loss will naturally result to numerous merchants hotel keepers and others, who have in the past built up a good business in these different ports by reason of the large tourists' trade coming in on the steamers of the defendant.

It is estimated that the refusal of defendant to run its steamers as usual to Mackinac Island in 1921 kept at least twenty thousand persons from visiting this famous resort during the summer of 1921.

The Arnold Transportation Company publicly announced that it had been compelled to discontinue its daily service by its large steamer Chippewa from Mackinac Island to Sault Ste. Marie, because of the action of defendant company in taking its steamers off the Mackinac route.

Such discontinuance of service by defendant in the future will materially retard for years the growth and prosperity of many of these ports.

And to all this—what assurance does defendant hold out to these ports and communities for the future?

Defendant company in its brief, page 16, says:

> * * * "What it has done *in no sense disables* it to transport passengers and freight upon the Great

Lakes or even upon its Mackinac division, if circumstances warrant. The bill shows that it still has all its vessels, and is engaged on other routes in performing its duties as a common carrier. * * * The fact that the Central Company, which did not possess any power of eminent domain, was under its charter conducting a business 'affected with a public interest,' was held to render it impossible for it to recover on a contract which totally disabled it from carrying out the business for which it was chartered. *No such case is here presented.*"

"If circumstances warrant" says this defendant.

To which we agree—but with this reservation—that the circumstances shall be those recognized by the law—not defendant's whim or hidden, ulterior motive."

POINT VIII.

The Lower Courts' Opinions and Conclusion of Brief.

To summarize:

If—and the District Court so held—*a common carrier by railroad could not at common law abandon its service arbitrarily.*

And if—and the District Court so held—such provisions as are contained in the Interstate Commerce Act and the Michigan Statute are merely "declaratory of the common law," and

Since the Interstate Commerce Act and the Michigan Statute apply to and define the duties of railroads and car-

riers partly by water and partly by railroad (of which respondent is one—see the *Goodrich Transportation case, 224 U. S., 194*) to be the same in this regard.

It follows logically *that a carrier by water, such as defendant should be compelled to render the same service and is under the same duties as a carrier by railroad at common law.*

And why not pray? If a carrier by water does not enjoy the right of eminent domain, it is solely because by the very nature of its transportation facilities it does not need this power. On the other hand, a number of expenses and charges which a carrier by railroad must meet, a carrier by water escapes.

And again we urge that entirely aside from the direct requirements of the acts of Congress and the Michigan Statute (Act 300 P. A. of 1909 of Michigan, as amended) the mere fact that a carrier has what is termed a permissive charter, does not relieve it of the usual obligations and duties of a carrier to the public.

In *Olcott v. Supervisors, 16 Wallace (U. S.), 678, at page 695,* this court used this language:

> "Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the state. Though the ownership is private, the use is public. So turnpikes, bridges, ferries, and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris.* The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, *but they are compellable to permit the public to use their works* in

the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge."

The concluding paragraph of Judge Knappen's opinion (which was filed some *seven* months after the case was submitted) is worthy of note.

He said:

"It is a matter of public information that the Michigan Public Utilities Commission has held that it has jurisdiction over some features, at least, of applications to compel resumption of service on the line in question. It scarcely need be said that the existence of such power in the commission confers no authority upon the courts to furnish the relief asked by the bill in this cause."

The city of Harbor Beach had previously filed its petition with the Public Utilities Commission of Michigan asking that the defendant Navigation Company be compelled to restore this necessary service.

The defendant answered and has denied the power, jurisdiction and authority of the commission in the premises, again claiming that it is a carrier by water and as such has, in effect, no duties or obligations to the public and its customers of a lifetime.

In the meanwhile the defendant plays fast and loose with the Lake Huron communities and cities and the traveling public.

Its position and attitude is summed up in its brief filed in the Court of Appeals in which it said:

* * * "What it has done *in no sense disables* it

> to transport passengers and freight upon the Great Lakes or even upon its Mackinac division, if circumstances warrant. The bill shows that it still has all its vessels, and is engaged on other routes in performing its duties as a common carrier." * * *

And thus the public necessities and interests involved must await the mere whim and caprice of this public servant.

No new company cares to attempt the expense of acquiring vessels and dockage rights with which to serve these communities—and then be put out of business by the overwhelming competition which the defendant company might at any time cause by a resumption of its regular route and business.

In the meanwhile it denies the power of any tribunal or authority to compel it to serve the public—and refuses to state whether it will itself in the future supply the much needed service or not.

The result to the public is obvious.

And in a broader sense the country at large is vitally interested in the questions at issue. The railroads of the country are suffering from different forms of just such competition—which seems to take to itself in a variety of ways—as by vessel, electric suburban car, country freight and passenger bus lines, jitneys and the like—the privilege of absorbing all business deemed profitable for the time being and of escaping all the onerous duties and obligations (that they can) of common carriers generally.

In conclusion, it is submitted that substantially every principal involved here is ruled by the following decisions of this court.

> *Central Transportation Company v. Pullman Company, supra.*

Interstate Commerce Commission v. Transit Company, supra.
Chesapeake & Ohio Railway v. Commission, supra.

It is further submitted that under the *Interstate Commerce case, supra,* the defendant company is a carrier subject to the duties and liabilities imposed by the Interstate Commerce Acts of Congress, and is obviously, under the same duty to the public as a carrier by railroad at common law.

That under the *Pullman Car Company case, supra,* the defendant cannot excuse itself from full performance of its public duties by reason of the fact that it has no right of eminent domain and does not operate its transportation vehicles over rails.

That under the *Chesapeake & Ohio Railway case, supra,* it is of no importance that the defendant company takes the position that it will not operate at all a branch line—for in this case the railway company was compelled to give passenger service where it had never done so before.

And this court in the last mentioned case lays down the rule which we believe should be applied here, namely, that the lower court be directed to take the proofs upon final hearing and determine the nature and extent of defendant's business on its Mackinac Route, its productiveness, the character of service required, and the public need for it.

Respectfully submitted

WILLIAM LUCKING,
Plaintiff and Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM LUCKING,
Petitioner,

v.

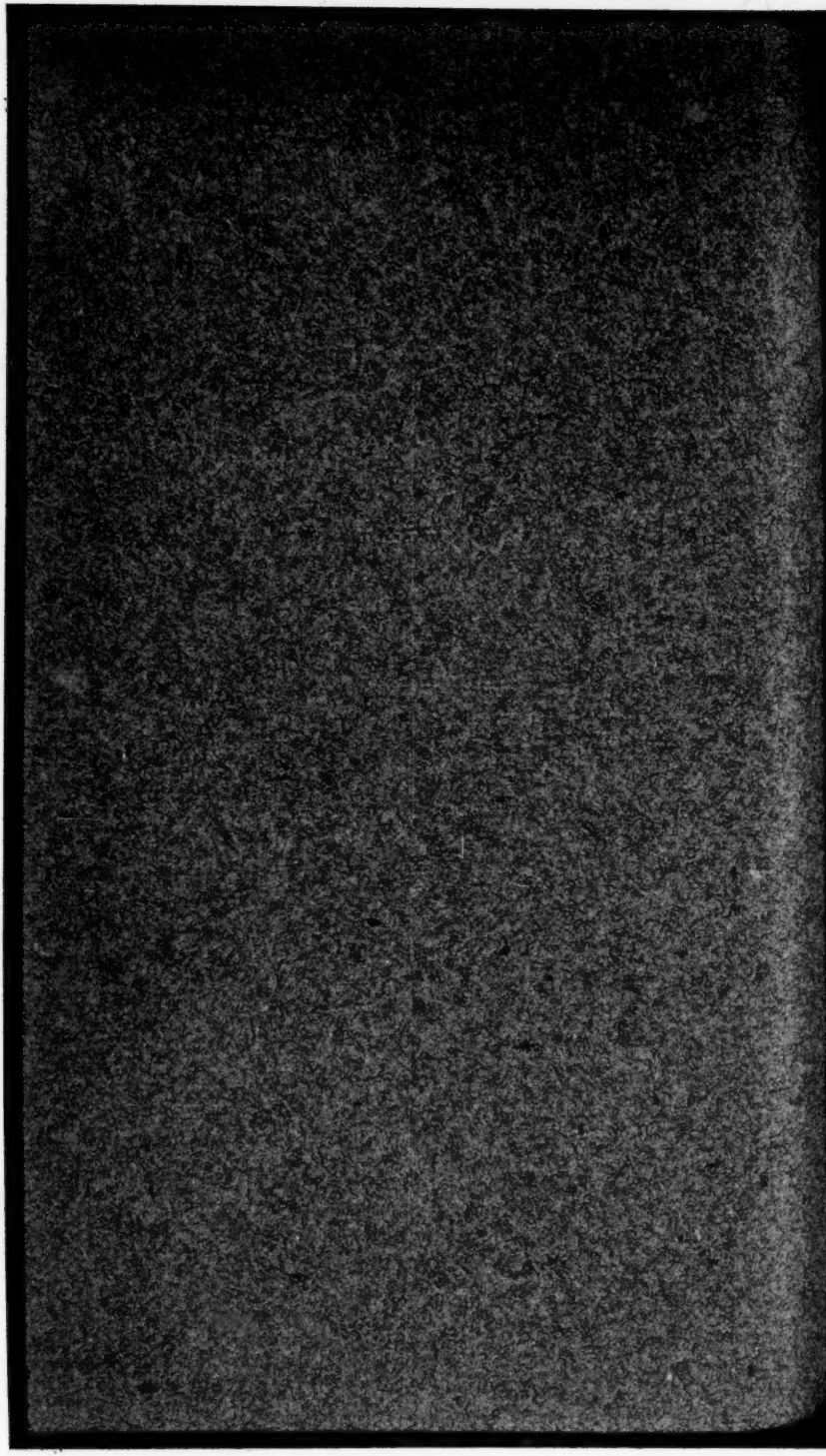
DETROIT AND CLEVELAND NAVIGATION COMPANY,
Respondent.

No. [redacted]212

PETITION AND BRIEF OF WILLIAM LUCKING FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

WILLIAM LUCKING,
For the Petitioner.

CONWAY BRIEF COMPANY
DETROIT, MICH.



IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM LUCKING,
Petitioner,

vs.

DETROIT AND CLEVELAND NAVIGATION COMPANY,
Respondent.

PETITION OF WILLIAM LUCKING FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Justices of the Supreme Court of the United States:

Petitioner respectfully prays for a Writ of Certiorari to review the final decree of the United States Circuit Court of Appeals for the Sixth Circuit, which affirmed the decree of the District Court of the United States for the Eastern District of Michigan in favor of the Detroit and Cleveland Navigation Company, hereinafter referred to as Respondent.

The Lower Court dismissed petitioner's bill of complaint filed to enjoin respondent from discontinuing its boat service of thirty years' standing over its well known Detroit to Mackinac Island Route.

Respondent, by its motion to dismiss, admits that it has the facilities with which to perform this service—that it is a common carrier—that this service is necessary to the public and the different ports on Lake Huron —and that it performs this service at a profit.

Respondent, however, took the position, in effect, in the Lower Courts that, being a carrier by water, it owed no duty to the public whatever—and could, in a word, operate its vessels over a given water route for thirty years, performing regularly a necessary transportation service for whole towns and communities and then suddenly abandon this route.

Respondent's regular steamers, City of Alpena II and City of Mackinaw II, were tied to the docks in Detroit and this territory has been without this necessary transportation service since.

The District Court sustained respondent in its contention, (see Opinion 273 Fed. 577) and petitioner appealed to the Court of Appeals for the Sixth Circuit, which affirmed the decree of the District Court. For its opinion see 284 Fed. 497.

THE FACTS

The averments of the Bill being taken as true on a motion to dismiss, it is therefore admitted:

That the respondent is a common carrier for hire and engaged in both interstate and intrastate transportation of passengers and property on the Great Lakes.

That it has carried on such business for thirty years or more over well known and defined routes between Detroit and Buffalo, Detroit and Cleveland, and Toledo Ohio and Detroit Michigan to Mackinac Island and St. Ingace. (Bill of Complaint Par. 3).

That it is a common carrier, partly by railroad and partly by water, being engaged in the continuous interstate transportation of freight and passengers from points on different railroads to and from points on its routes.

That respondent intends to and will carry on its general business as a common carrier during the season of 1921 and thereafter and will derive a large profit from such business. (Par. 4, 5).

That its Detroit to Mackinac Island Route is one of the most popular and largely traveled routes on the Great Lakes. That it has maintained for years over this route a regular four trip per week service by its steamers, Alpena II and Mackinac II, and has carried over this route tens of thousands of passengers and hundreds of thousands of tons of freight. (Par. 6).

That respondent has made large profits on its capital invested in this business and has availed itself of the many costly harbor improvements maintained by the United States.

That in 1919 its profits on its business equalled 25% after all Federal and other taxes had been paid.

That respondent has made a large net profit in the past on its business over its Detroit to Mackinac Route, (Par. 7).

That many of the ports and cities of Lake Huron were developed and built up in part by, and depend upon this transportation service of respondent, and that large amounts of the products of these ports and cities on Lake Huron are carried regularly on its steamers. (Par. 8).

That petitioner has been a passenger and shipper of goods in the past and intends to use said boats in the future. (Par. 9).

That respondent is discontinuing said Detroit to Mackinac service because of dissatisfaction with the Seamen's Act and intends to abandon this route and leave the territory served by its steamers without such transportation facilities (Par. 10).

That the Bill of Complaint is filed on behalf of all other persons who may desire to intervene. (Par. 14).

The prayer of the Bill is that the respondent be compelled by this Court to operate its steamers Alpena II

and Mackinaw II on said Detroit to Mackinac Route as has been its custom and usage in the past, and with rates and charges upon a reasonable and fair basis.

Upon the hearing on Appeal, the cities of Alpena, Harbor Beach and Cheboygan obtained permission to appear and be heard on briefs in support of the bill of complaint.

It is to be noted that no service is asked of this respondent which it has not given for the last twenty or thirty years to this territory.

That no request is made for additional facilities or expenditures of money for additional boats or equipment of any kind.

The Lower Court was asked to compel respondent to operate its steamers as usual and to not permit it to arbitrarily and without reason deprive this territory of the transportation facilities upon which it depends and upon which it was built up in the past.

And the bill avers that respondent could perform this service and does perform it at a profit, and that its entire business brings it in a large and handsome return on its investment.

QUESTIONS PRESENTED

The case presents a question of great public importance, involving as it does the right of the general public to have maintained a necessary and very important carrier service by water.

It involves the question whether obligations and duties held by this Court applicable to common carriers generally, are to be applied to common carriers by water or whether such carriers are in a class by themselves and thus relieved from performance of the usual duties of a carrier to the public.

The petitioner and the intervening cities on Lake Huron, contended that since the respondent had for over thirty years operated its vessels over a well established route upon Lake Huron and under regular schedules

And since by such regular service communities had been built up and a public necessity for such service created

And since respondent's general business returned it a handsome profit which it continued to derive from its regular routes upon Lake Erie from Detroit to Cleveland and Detroit to Buffalo, that respondent could not arbitrarily abandon its established route from Detroit to Mackinac Island and all service thereon which was necessary to the public and for which it had adequate facilities.

It is submitted that the question presented is one of vital importance to the public, not only of Michigan and surrounding territory, but also of the Country at large.

It presents to this Court the question whether common carriers by water are to be held to the same duties and obligations as those pertaining to other common carriers, such as railroads. A determination of the case involves consideration of three questions, namely:

(1st) Whether Respondent is within the terms of the Interstate Commerce Act and Amendments and what if any duties to serve the public are imposed upon it thereby.

(2nd) Whether Respondent is under any duty at common law to maintain a necessary service over an established route.

(3rd) Whether Respondent is under such duty by virtue of any of the statutes of the State of Michigan.

Although petitioner has appealed to this Court from the decree of the Circuit Court of Appeals, which appeal has been allowed and a transcript duly filed, this petition for certiorari is also submitted.

Wherefore, petitioner respectfully prays that a Writ of Certiorari issue under the seal of this Court and directed to the Circuit Court of Appeals of the United States for the Sixth Circuit in order that its decree may be reviewed by this Court as provided by law, and that petitioner have such other relief as may be appropriate.

William Lucking

STATE OF MICHIGAN—County of Wayne, ss.

WILLIAM LUCKING being duly sworn deposes and says that he is counsel for the petitioner in the above cause, that he knows the contents of said petition and that the facts therein stated are true to the best of his knowledge and belief.

William Lucking

Subscribed and sworn to before me this 2. day of February, 1923.

Le Roy C Lyon (Seal)

Notary Public, Wayne County Mich.

My commission expires 6/20/1925

I certify that I have examined and read the foregoing petition for Certiorari and that in my judgment the petition is well founded and should be granted by this Honorable Court and that said petition is not filed for delay.

William Lucking

Dated February 2. 1923.

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM LUCKING,
Petitioner,

vs.

DETROIT AND CLEVELAND NAVIGATION COMPANY,
Respondent.

BRIEF FOR PETITIONER

POINT I.

This Court may grant Petitioner full relief—Whether Petitioner's right thereto is based upon the provisions of the Interstate Commerce Act or upon the common law right to compel a carrier to perform its duties, or upon a statute of Michigan.

Greene vs. Railroad Company, 244 U. S. 499,

Siler vs. Louisville & R. R. Co. 213 U. S. 175 191,

Ohio Tax Cases, 232 U. S. 576, 586.

POINT II.

A common carrier by water is charged with the same obligations and duties as any other carrier.

The Maggie Hammond, 9 Wall. 435, 460,

The Lady Pike, 21 Wall. 1, 14,

The Niagara vs. Cordes, 21 How. 7, 23,

Central Transportation Co. vs. Pullman Co., 139 U. S. 24, 50,

Citizens Bank vs. Nantucket Steamboat Co., 2 Story 16, Federal Cases No. 2730.

POINT III.

The Respondent is a common carrier, partly by railroad and partly by water, within the meaning of the Interstate Commerce Act, and is as specifically within the terms of that Act as any other carrier named therein.

Interstate Commerce Commission vs. Goodrich, Transit Company, 224 U. S. 194, 207.

In *Interstate Commerce Commission vs. Goodrich Transit Company, supra,* Mr. Justice White in delivering the opinion of this Court said:

> "The first section makes the act apply alike to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water under an arrangement for a continuous carriage or shipment. It

> is conceded that the carriers filing the bills in those cases were common carriers engaged in the transportation of passengers and property partly by railroad and partly by water under a joint arrangement for a continuous carriage or shipment. Such common carriers are declared to be subject to the provisions of the act in precisely the same terms as those which comprehend the other companies named in the act. Carriers partly by railroad and partly by water under a common arrangement for a continuous carriage or shipment are as specifically within the terms of the act as any other carrier, named therein."

It is of interest that in the *Goodrich Case supra,* counsel's contention that vessel companies were not subject to the act for any purpose (See pages 199 and 202) was disposed of by this Court at bottom of page 207 of its opinion.

The provisions of the Interstate Commerce Act apply to many different kinds of common carriers.

Pipe Line Companies are within the Act.

The Pipe Line Cases, 234 U. S. 548.

Telephone and Telegraph Companies are within the Act.

Stevens vs. Telephone Co. 240 Fed. 759.

To Terminal Companies, even though they are wholly within one state.

United States vs. Union Stockyard, 226 U. S. 286,

Penn. Co. vs. United States, 236 U. S. 351.

To Steamship Companies, which participate in continuous shipment of freight by arrangements with railroads.

Interstate Commerce Commission vs. Transit Company, supra,

Alaska Steamship Co. vs. Ass'n., 236 Fed. 964.

POINT IV.

That the Respondent Steamship Company is clearly within the terms of the Interstate Commerce Act is shown by the different amendments to the Act.

The present act provides:

> "(1) That the provisions of this Act shall apply to common carriers engaged in—
>
> (a) the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or * * * *
>
> (3) * * * Wherever the word 'carrier' is used in this Act it shall be held to mean 'common carriers' * * * *the term 'transportation' as used in this Act* shall include locomotives, cars and other vehicles, *vessels* and all instrumentalities and facilities of shipment or carriage."

Interstate Commerce Act as amended by the Act of February 28, 1920.

Section 3, supra, was amended recently so as to include the term "vessels."

The word "transportation" is of importance in construing the Act.

Penn. Co. vs. U. S. 236 U. S. 351, 363.

Section 4 of the Interstate Commerce Act provides that:

> "* * * (4) It shall be the duty of every common carrier subject to this Act engaged in the *transportation of passengers or other property* to provide and furnish such *transportation upon reasonable request therefor.*"

These provisions of the Act apply to a coast wise steamship company or lake carrier within the United States and compel it to furnish adequate facilities for transportation of passengers and freight.

> *Alaska Steamship Company vs. Longshoremen's Association,* 236 Fed. 964, 971.

The Interstate Commerce Act was originally directed entirely against practices of discrimination.

Act of February 4, 1887 (24 U. S. Stats. 379)

Then by amendment of June 29, 1906 a provision directing rendition of transportation service upon reasonable request was added—see

34 Stats. 584 Sec. 1 end of 2nd Paragraph.

This provision has been commented on by this Court in

Chicago Ry. vs. Elevator Co., 226 U. S. 426, 434.

Ellis vs. I. C. C. 237 U. S. 434, 443 (first syl).

Thereafter this provision was re-arranged as Subdivision 4 of Section 1 of this Act. See 41 Stat. 474, amendment of February 28, 1920.

The provisions of the Interstate Commerce Act do not apply, however, to ocean carriers transporting goods to foreign countries.

Pacific Steamship Co. vs. Railroad Co., 251 Fed. 218 (9 C. C. A.).

POINT V.

Common carriers are often compelled to operate branch lines where the public necessity therefor appears.

The bill avers that this necessary service can be rendered without loss and this, of course, is taken as true. It also avers that the respondent is making large returns on its capital and several times what is earned by an ordinary carrier by railroad.

But even though some slight loss was made on this Mackinac Route, since respondent admits that on all its business it makes a considerable profit, it has no legal right to abandon this service, for the public necessity therefor is also admitted.

Chesapeake & Ohio Railroad Co. vs. Commission, 242 U. S. 603, 607;

Atlantic Coast Line vs. Commission, 206 U. S. 1-24.

In *Chesapeake & Ohio Co. vs. Commission, supra,* an Order requiring the Railroad Company to run two passenger trains each day upon a branch on which no passenger service had ever been had, although such trains would be run at a loss, was sustained.

The Supreme Court in laying down the rule to be followed in all cases said:

> "One of the duties of a railroad company doing business as a common carrier is that of providing reasonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the State and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. *Atlantic Coast Line Railroad Co. vs. North Carolina Corporation Commission,* 206 U. S. 1, 26; *Missouri Pacific Ry. Co. vs. Kansas,* 216 U. S. 262, 279; *Oregon Railroad & Navigation Co. vs. Fairchild,* 224 U. S. 510, 529; *Chicago, Burlington & Quincy R. R. Co. vs. Wisconsin Railroad Commission,* 237 U. S. 220, 229. That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, but it is not the only one. The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon

the service already being rendered are also to be considered. Cases supra. Applying these criteria to the order in question, we think it is not shown to be unreasonable."

And see:

Colorado Co. vs. Commission, 54 Colo. 64, 129 Pac. 506;

State vs. R. R. Co. 53 Kan. 377, 36 Pac. 747;

Southern Company vs. Franklin Co., 96 Va. 693, 32 S. E. 485;

People vs. Albany R. Co., 24 N. Y. 261;

Southern R. R. Co. vs Hatchett, 174 Ky. 463, L. R. A. 1917-D 1105;

Hocking Valley Co. vs. Commission, 92 Ohio St. 9 L. R. A. 1916-A 267.

Common carriers must operate branch lines, where public necessity requires, even though there is no statute or charter provision—the route having been laid out voluntarily by the carrier and the service given for a long period of years.

Gasser Case, 205 Mich. 5.

Grinsfelder vs. Spokane Ry. Co. 19 Wash. 518, 41 L. R. A. 515,

Hocking Valley Co. vs. Commission, 92 Ohio St. 9, L. R. A. 1918-A 267,

State vs. Bullock, 78 Fla. 82 So. 866.

This is not a case where the carriers' entire operations and service are at a loss and it seeks to surrender its franchises and go out of business.

Of course, under special circumstances a carrier may abandon operation, as in the cases of

Bullock vs. R. R. Commission, 254 U. S. 513, 521,

Iowa vs. Trust Co. 215 Fed. 307 (8 C. C. A.)

State vs. Jack, 145 Fed. 281 (4 C. C. A.)

But carriers by steamboat may not disregard the rights of the public.

Lee Steamers vs. Packet Co., 277 Fed. 5, 9 (6 C. C. A.)

No one can be compelled to engage in business as common carrier—but if they do, they become subject to the duties of common carrier—even though such duty is not imposed by Statute or Order of Commission.

Missouri Pacific Co. vs. Larabee Mills, 211 U. S. 612, 619.

Respondent having been incorporated as a common carrier by the State of Michigan—with power to own and hold property for that purpose—and

Having exercised its corporate powers and privileges to that end for a great number of years, and having operated its steamers over its Detroit to Mackinac Route for over thirty years, and

Now continuing to exercise its corporate franchises on its Detroit to Cleveland and Detroit to Buffalo Routes, we submit:

It cannot arbitrarily abandon its customary service on the Mackinac Route and thus avoid its implied duty to the public, and for which there is a public necessity.

It is of no consequence that respondent's charter is what is sometimes referred to as "permissive" and does not contain express stipulations in so many words requiring operation of its steamers on this Mackinac Route.

Gasser vs. Garden Bay Railway Co., 205 Mich. 5, 19, 20;

Winona, etc. Railroad Company vs. Blake, 94 U. S. 180;

Munn vs. Illinois, 94 U. S. 113, 125, 126;

Bryan vs. L. & N. R. R. Co., 244 Fed. 650, 654 (8 C. C. A.).

In *Gasser vs Railroad Company, supra*, it was held by the Supreme Court of Michigan that a railroad company, having been incorporated as a common carrier, and having entered upon the operation of its line under the implied duty to the public to continue its operation as a public service corporation, could not thereafter arbitrarily abandon operations, permanently discontinue the assumed service, and dismantle the road without the consent of the state through its constituted authority.

POINT VI.

That Respondent enjoyed no right of eminent domain from the State of Michigan, does not relieve it from its duty to afford the public an admittedly necessary transportation service.

The District Court in its opinion in this Case said:

> "It is true that common carriers like railroad companies, which enjoy peculiar rights and powers at the hands of the state, are not permitted to discontinue at will, the rendition of the transportation services for the performance of which they have been endowed with such special privileges and powers. A railroad company is clothed by the state with special rights, franchises and privileges, including certain attributes of sovereignty itself, as, for example, the power of eminent domain. * * * * *
>
> "The reasons however, which underlie and prompt the imposition of this duty upon common carrier railroad companies do not apply to common carriers such as the defendant. The latter holds no public franchise and enjoys no rights or privileges, other than are held by any private individual desiring to engage in the business of transporting freight and passengers by water. It cannot exercise the power of eminent domain."

This very contention was raised by counsel for the Transportation Company in the case of *Central Transportation Company vs. Pullman Company, supra,* and very distinctly and emphatically disapproved by this Court.

For Counsel for the Transportation Company (quoting from page 29 of Volume 139 of the Supreme Court Reports) argued to this Court that:

> "This case differs from *Thomas vs. Railroad Company*, 101 U. S. 71; *Pennsylvania Railroad Co. vs. St. Louis, Alton, etc. Railroad Co.*, 118 U. S. 290 307; and *Oregon Railway Co. vs. Oregonian Railway Co.*, 130 U. S. 1, in that no privilege was conferred upon the Central Transportation Company, which required the performance of some duty as an equivalent. It never became a trustee for the public to discharge a duty because of a privilege conferred. It was vested with a franchise to be a corporation, to use a seal, and to act without its members becoming individually liable, saving to a certain extent, for its debts. It was permitted to do nothing which could not be done by an individual. Its sole power was to manufacture cars under specified patents. It was in precisely the same position as that of a limited liability company, which is only permitted to do what may be done by individuals; which is not a corporation; but which, under the laws of Pennsylvania may use a common seal, and may act without its members being liable for its debts. * * * * * A railroad corporation, however, is only authorized to locate a road between certain termini. After it has located the same, its power further to locate is at an end. Its right of way, therefore, becomes absolutely necessary to the continuance of its railroad. There is, therefore,

a very obvious reason for requiring that such property so necessary to the exercise of the quassi public franchise, shall not be disposed of. There is no such reason in the case of a manufacturing corporation, which may build or buy, as many mills as it may see fit.

The Central Transportation Company, though called a "transportation company", was, as we have said, a manufacturing corporation, with no right to transport, saving as the same resulted from its right to use the cars which it might manufacture. In selling or leasing such cars it exercised a right of ownership incidental to its right to manufacture, as much as was that to transport, and it violated no duty to the public such as it would have owed to it if it had acquired property under the right of eminent domain, or had been vested with a power to do some act for the public benefit, by legislative grant, which it was not competent for individuals to perform. * * * * It is not open to any person other than the Commonwealth, to complain that a private corporation deserves a writ of ouster because of its non-exercise of its franchises. Of course, the case is different with a quasi public corporation; for there the public have a right to demand that the property which it has acquired under the right of eminent domain, shall be used for the benefit of those whose rights alone justified its grant. This right the court will make efficacious whenever a person in interest asks it so to do.

> The distinction between quasi public and ordinary trading corporations, is one that is much more than hinted at in *Thomas vs. Railroad Company, supra*, and is very clearly stated in the text books, and in many of the cases."

These contentions this Court overruled in their entirety in the following language:

> "The plaintiff, therefore, was not an ordinary manufacturing corporation, such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation. *Ardesco Oil Co. vs. North American Oil Co.*, 66 Penn. St. 375; *Treadwell vs. Salisbury Manuf. Co.* 7 Gray, 393. But the purpose of its incorporation, as defined in its charter, and recognized and confirmed by the legislature, being the transportation of passengers, the plaintiff exercised a public employment, and *was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers owes to the public, independently of possessing any right of eminent domain.* The public nature of that duty was not affected by the fact that it was to be performed by means of cars constructed and of patent rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a quasi public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the

performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. *Pickard vs. Pullman Southern Car Co.*, 117 U. S. 34; *York & Maryland Railroad vs. Winans*, 17 How. 30, 39; *Railroad Co. vs. Lockwood*, 17 Wall, 357; *Liverpool & Great Western Steam Co. vs. Phenix Ins. Co.*, 129 U. S. 397."

Moreover, respondent Navigation Company enjoys a great privilege granted it by the state, namely, practical immunity from all taxation on its very valuable steamers.

CONCLUSION

To summarize:

If—and the District Court so held—*a common carrier by railroad could not at common law abandon its service arbitrarily*

And if—and the District Court so held—such provisions as are contained in the Interstate Commerce Act and the Michigan Statute are merely "declaratory of the common law", and

Since the Interstate Commerce Act and the Michigan Statute apply to and define the duties of railroads and carriers partly by water and partly by railroad (of which respondent is one—see the Goodrich Transportation case, 224 U. S. 194) to be the same in this regard.

It follows logically *that a carrier by water, such as respondent is now compelled to render the same service and is under the same duties as a carrier by railroad at common law.*

And why not pray? If a carrier by water does not enjoy the right of eminent domain, it is solely because by the very nature of its transportations facilities it does not need this power. On the other hand, a number of expenses and charges which a carrier by railroad must meet, a carrier by water escapes.

And again we urge that entirely aside from the direct requirements of the Acts of Congress and the Michigan Statute, (Act 300 P. A. of 1909 of Michigan, as amended) the mere fact that a carrier has what is termed a permissive charter, does not relieve it of all obligations and duties to the public.

> *Wyman on Public Service Corporations, Volume* 1 *Sections* 305 *and* 306.

In *Olcott vs. Supervisors,* 16 Wallace (U. S.) 678, at page 695, this Court used this language:

> "Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed in that of State. Though the ownership is private, the use is public. So turnpikes, bridges, ferries, and canals, although made

by individuals under public grants, or by companies, are regarded as publici juris. The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, *but they are compellable to permit the public to use their works* in the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge."

In Conclusion, it is submitted that substantially every principle involved here is ruled by the following decisions of this Court.

Central Transportation Company vs. Pullman Company, supra,

Interstate Commerce Commission vs. Transit Company, supra,

Chesapeake & Ohio Railway vs. Commission supra.

It is further submitted that under the Interstate Commerce case, supra, the defendant company is a carrier subject to the duties and liabilities imposed by the Interstate Commerce Acts of Congress, and is obviously, under the same duty to the public as a carrier by railroad at common law.

That under the Pullman Car Company case, supra, the defendant cannot excuse itself from full performance of its public duties by reason of the fact that it has no right of eminent domain and does not operate its transportation vehicles over rails.

That under the Chesapeake & Ohio Railway case, supra, it is of no importance that the defendant company takes the position that it will not operate at all a branch line—for in this case the Railway Company was compelled to give passenger service where it had never done so before.

And this Court in the last mentioned case lays down the rule which we believe should be applied here, namely, that the Lower Court be directed to take the proofs upon final hearing and determine the nature and extent of respondent's business on its Mackinac Route, its productiveness, the character of service required, and the public need for it.

Respectfully submitted,

William Lucking,
Petitioner.

In The

Supreme Court of the United States

October Term, 1923.

No. 212.

WILLIAM LUCKING,

Plaintiff and Appellant,

v.

DETROIT & CLEVELAND NAVIGATION COMPANY,

Defendant and Appellee.

BRIEF FOR APPELLEE.

ALEXIS C. ANGELL,
Attorney for Defendant and Appellee.

ALEXIS C. ANGELL,
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SUBJECT INDEX.

CASES CITED.

In The

Supreme Court of the United States

October Term, 1923.

No. 212.

WILLIAM LUCKING,

Plaintiff and Appellant,

v.

DETROIT & CLEVELAND NAVIGATION COMPANY,

Defendant and Appellee.

BRIEF FOR APPELLEE.

THE QUESTION INVOLVED.

Was the defendant in March, 1921, forbidden by law to cease operating its steamers on the route between Detroit and Mackinac Island, Michigan, while continuing to operate steamers on a route between Detroit and Cleveland, Ohio, and on a route between Detroit and Buffalo, New York?

It is not claimed, and cannot be claimed, that any of the cities touched by the steamers on the Detroit and Mackinac

route are without railroad service, or that plaintiff is without public service by water or by rail and water, between Detroit and Mackinac during the navigation season (Opinion Cir. Ct. of App., Tr., 22, at top).

STATEMENT OF THE CASE.

The question stated arises out of a bill filed in March, 1921, in the District Court for the Eastern District of Michigan in Equity. In the bill the plaintiff alleges that early in January, 1921, the public press stated that the defendant intended to discontinue the operation of its steamers in the ensuing season of navigation over the Detroit and Mackinac route which it had for a long time operated thereon (Tr., 4, Secs. 8 and 10 of the bill); that in February, 1921, plaintiff applied to the Interstate Commerce Commission for relief by petition similar to his bill, and that his application was denied (Tr., 6; Sec. (13) of bill).

The bill prays for a mandatory injunction to compel the defendant to fit out two of its steamers and to operate its vessels over the route aforesaid during the navigation season of 1921.

The court dismissed the bill and refused to grant a rehearing. The plaintiff removed the cause to the Circuit Court of Appeals for the Sixth Circuit. That court affirmed the decree of the District Court (Tr., 19).

The opinions of the District Court are set out on pages 11 and 17, and that of the Court of Appeals on page 19 of the Transcript. The case was then brought to this court.

In substance the bill sets out that the defendant is a corporation organized under the laws of the State of Michigan and quotes from its Articles of Association the statement of the purpose for which it was organized; alleges that it is a common carrier for hire and has long operated steamers between Detroit and Cleveland, Ohio, steamers between Detroit and Buffalo, New York, and steamers between Detroit and Mackinac Island, Michigan; and that it proposes to operate steamers on the first two named routes in the season of 1921; that by arrangement with rail carriers it has been engaged, under joint lake and rail tariffs, in continuous transportation of passengers and property, partly by rail and partly by water, from various ports on the routes reached by its steamers to and from various points on the railroads of said rail carriers; that it has long operated steamers on the route between Detroit and Mackinac Island; that its business as a whole has been profitable; alleges, *upon information and belief,* that it has made large profits from operating the Mackinac route; that if the operations from such route have resulted in a loss, its business as a whole has made a profit; that plaintiff has been, and desires to become, a passenger on its steamers used on the Mackinac route; that defendant threatens not to operate steamers on that route in the navigation season of 1921, and that it is defendant's duty to operate its steamers on said route in said season.

It is to be noted that defendant is not, itself a carrier by rail, nor is it alleged so to be in the bill. It carried persons and property by water and in some cases under joint tariff rules and arrangements with rail carriers (Opinion Court of Appeals, Tr., 24, line 34).

The defendant answered this bill fully under oath and joined with its answer a motion to dismiss. It admitted

that it intended to discontinue the operation of its two steamers over the Mackinac route, and stated the reasons why it so intended, in paragraphs 6 and 10 of its answer (Tr., 9, 10).

In the plaintiff's brief it is said several times (for example, on pages 4 and 6), that defendant "arbitrarily" has ceased to operate over this route, and (on page 36) that this was done for mere "whim and caprice," and (on page 31) that its action was "as arbitrary as it was abrupt."

The word "arbitrarily," and the words "whim and caprice," are, it is submitted, hardly applicable when the allegations of the bill on information and belief are compared with the sworn averments in the answer above referred to.

As to the word "abrupt," the plaintiff in his bill claims that authorized statements appeared in the public press early in January, 1921, within a few weeks after the season of navigation of 1920 closed and some months before the ordinary opening of navigation in 1921, that defendant did not intend to operate steamers on the Mackinac route during the season of 1921.

It is said (Brief, page 2) that defendant took the position in the lower courts that "being a carrier by water, it owed the public no duty whatever." It is a mistake to suppose that the defendant took the position in any court that it owed the public no duty whatever. It did contend in the lower courts, as it contends here, that it had the right to abandon the operation of its steamers on the Mackinac route in the season of navigation of 1921.

It is apparent that the Court of Appeals, in its opinion, has aptly stated the question in the case as follows:

> "The sole question before us is whether, either by common law or by statute (Federal or State) defendant is forbidden to cease or suspend navigation over a given route which it has previously operated, because such cessation entails inconvenience or hardship upon the public previously served by such utility."

The question thus stated by the Court of Appeals involves the consideration of these points:

Was the defendant under a duty to maintain service on the Mackinac route imposed

(1) by any statute of the State of Michigan;

(2) by any common law principle;

(3) by any Federal statute?

Our contention is that no duty is imposed upon it by any statute or by the common law.

ARGUMENT.

I.

No Duty is Imposed On the Defendant By Any Michigan Statute to Maintain Service On the Route.

1. No such duty is imposed by the statute under which the defendant is organized.

Defendant is organized under the Act of 1867 commonly called the Commerce and Navigation Act, being Chapter 181 of the Compiled Laws of 1897, Volume 2, page 2154, entitled "An Act to authorize the formation of corporations for the purpose of engaging in commerce and navigation."

The Act provides, Section 2, that by compliance with its provisions persons may become a body corporate "for the purpose of engaging in the business of maritime commerce or navigation within this State or upon the frontier lakes or other navigable waters, natural or artificial, connecting therewith."

This statute was superseded by the general incorporation Act of Michigan of 1903, Act 232, Public Acts of 1903, Compiled Laws of 1915, Chapter 175, under which vessel companies have since been organized. The Act of 1903

contains a saving clause as to rights which had accrued under the Act of 1867.

Under the Act of 1867 and under that of 1903 a vessel company is given no right to navigate any particular waters of the Great Lakes, and no duty is imposed upon it to navigate any particular waters.

The Act permits those who associate to become a body corporate, but it in no manner attempts to direct how or where the corporation shall conduct its business of maritime commerce.

The defendant's Articles of Association contain the following:

> "Art. I: This corporation is formed for the purpose of engaging in the business of maritime commerce or navigation within this State or upon the frontier lakes, natural or artificial, connected therewith, and for acquiring, owning, holding and disposing of every kind of real and personal property, or estate, whatsoever, which may be necessary to enable this corporation to carry on the operations and business mentioned herein."

These Articles, which constitute the Company's charter, contain no designation or mention of the route over which navigation was to be carried on. The statute did not require any such designation. The corporation is given no power except the power to be a corporation which an individual vessel owner does not have. The corporation may do nothing more in the way of conducting its business than an individual owner, or partnership owners, may do in operating a vessel. The only difference between a partnership operating a vessel and a corporation organized under this Act operating a vessel, is that the owners of

stock in the corporation risk in the enterprise, not their whole credit or property, but only their investment in the stock.

A vessel company gets no more privileges from the State than does a manufacturing company; indeed, as has been stated, for many years vessel companies have been organized under the general Act relative to manufacturing companies. A vessel corporation is given no power of eminent domain; no power to build or remove bridges or wharves; no powers of like kind, such as are conferred by law upon a corporation organized to operate a railroad or a telephone or telegraph line. No duty is imposed upon a vessel corporation to fix or maintain any particular route, as is the case with a railroad company.

All that is given by the statute is the power to become a corporation, the same power that is given to a manufacturing company or to a mutual benefit society. As Judge Tuttle, in the District Court, has said:

> "The reasons, however, which underlie and prompt the imposition of this duty upon common carrier railroad companies do not apply to common carriers such as the defendant. The latter holds no public franchise and enjoys no rights or privileges other than are held by any private individual desiring to engage in the business of transporting freight and passengers by water. It cannot exercise the power of eminent domain. It has no private right-of-way or special facilities for acquiring means of access by its vessels to docks or wharves, but must use the open sea as its highway and depend, for the proper maintenance of its vessel and equipment, upon such arrangements as it may be able to make by private contract, like any other private citizen. In the eyes of the law it occupies no different position than that

of a common carrier operating taxicabs or other vehicles upon land, and it is under no greater obligation than is the common carrier last mentioned, so far as the continued operation of its lines is concerned" (Tr., 15).

So far as the statute under which it is organized is concerned, no duty rests upon the defendant to maintain service on the Mackinac route.

2. The Michigan tonnage tax, so-called, does not impose any such duty.

The plaintiff, on pages 29 and 30 of his brief, dwells upon this Act, as if it did impose the duty alleged by him to exist.

In 1911 a statute was adopted in Michigan, providing that steam vessels engaged in carrying passengers and freight and employed in navigation of the Great Lakes should be taxed, not locally, but by paying to the State a tax of 20 cents a ton on the registered tonnage of the vessel. In this way the situs of vessel property for taxation was settled. The Act is general in its application, including individual owners, partnership owners and corporate owners. There is nothing in it bearing upon the discontinuance by an owner of the operation of a particular route, and such is the conclusion of the Court of Appeals (Tr., 24).

3. The Railroad Commission Act, 2 Compiled Laws of 1915, page 2906, does not control a vessel company. The definitions of "common carrier" and "transportation" in Sections 3 (a) and 3 (b), Section 8111, show that it was not the legislative purpose that the Act should apply to

vessel companies engaged in maritime commerce and navigation.

There is in the Act nothing which expressly or by implication forbids a corporation to which it does apply from ceasing to operate a line.

The language of Section 4 of the Act, in view of the definition of "common carrier" earlier given, plainly does not refer to vessel companies, nor does it require that the carrier subject to the Act must forever furnish service, but requires only that so long as it does furnish service, the service must be reasonably adequate, and for a reasonable charge.

4. Act No. 56 of the Public Acts of 1917 does not affect this case. The Act provides that "no person, firm or corporation owning or operating any railroad shall abandon its main line of track, or any portion thereof, without the permission of the State Railroad Commission." It has no reference to vessel companies.

The Court of Appeals remarks:

> "It is significant that this statute contains no mention whatever of common carriers by water and discloses, we think, an express legislative intent not to include them" (Tr., 25).

The statute is substantially like the provision in the Federal Transportation Act of 1920, which now stands as subsection 18 of section 1 of the Interstate Commerce Act, which is discussed here in another connection.

5. Act No. 246 of the Public Acts of 1921 became operative after the bill in this case was filed. The Act gives the Michigan Public Utilities Commission power to regu-

late the service rates, fares and charges, rules and regulations of carriers by water within the State, and to hear complaints and make orders thereon. This statute obviously confers no power on the courts under such a bill as this, as is pointed out by the Court of Appeals (Tr., 25).

II.

No Duty is Imposed On the Defendant By Any Common Law Principle to Maintain Service On the Route.

1. No decided case has been found by either party, nor by the Court of Appeals, in which it has been held that a common law duty exists, such as is here contended for by plaintiff.

The individual owner who operates his vessel in maritime commerce may become a common carrier, for hire, of freight and passengers. He may thus become subject to the public regulation of his business practices and his charges for services; so may a partnership; so may a corporation.

The individual, partnership and corporation may navigate with vessels public waters—one as freely as the other.

It was not uncommon in former years for a man to own vessels which for a considerable time were run on a particular route on the Great Lakes and to become a common carrier on that route. See for example:

Wright v. Caldwell, 3 Mich., 51.
McKee v. Owen, 15 Mich., 115.
Laffrey v. Grummond, 74 Mich., 186.

for instances of this kind.

Had such an individual ceased to operate a line which had thus been operated between ports on the Great Lakes, he could not have been compelled against his will to continue to operate the line.

Judge Tuttle, in the District Court, said, correctly:

> "It has never been supposed, and could not seriously be contended, that every person who engages in the business of transportation as a common carrier is obliged to continue in such business indefinitely and may be restrained by injunction from abandoning such of its routes as it may wish to discontinue.
>
> The mere fact, then, that the defendant is a common carrier does not subject it to the duty to continue the operation of its vessels over any or all of its routes of transportation. As, therefore, it does not appear that the defendant is a public or quasi-public corporation, or exercises any powers or rights from which flow the duty in question, I am unable to find in the common law any basis or warrant for the coercive order sought, and I am clearly of the opinion that in the absence of some statutory provision applicable the plaintiff is not entitled to the relief prayed" (Tr., 15, 16).

The Circuit Court of Appeals in this connection used the following language:

> "In our opinion such suspension or discontinuation of service upon one or more, or all, of the routes theretofore navigated is not forbidden by the common law under circumstances such as exist here. None of the numerous decisions which assert the power of the courts to prevent suspension or discontinuance by a railway company of its rail lines, in whole or in part, have, so far as we are advised, had any relation to navigation companies. So far

as decisions denying the right of a railroad company to abandon its lines or tracks may be thought to rest upon common law principles, unaided by statute, an exception, upon principle, of navigation companies such as defendant may well be found in the absence of contract, express or implied, for operating upon a given route, in connection with the lack of privileges such as eminent domain, as applied either to lines of travel (unnecessary upon the open seas) or to the acquisition of dock and wharf facilities, as well as with the common practice of navigation companies to go out of business altogether or to change routes and service from time to time, as the interests of the navigation company may dictate. But whatever may be the reason, the fact that the existence of the common law power asserted by plaintiff has not heretofore been judicially declared is highly significant'' (Tr., 22-24).

So long as the respondent continues to operate a line, it is, it is true, obliged to furnish on such line reasonable service in transportation for passengers and freight. No question is involved here of the reasonableness of the service on any route which was operated by respondent when this suit was instituted. The duty of reasonable service upon operated lines is not a duty to continue service upon a line which respondent has ceased to operate.

The fact that respondent is a corporation does not impose upon it a duty to maintain its service, if it wishes to discontinue it. In this regard it is in no different position from an individual carrier. (See discussion under Point I above.)

It is not obliged at common law to maintain service on the Mackinac route under the circumstances existing here.

2. The appellant in his brief argues that common carriers are often compelled to operate branch lines where a public necessity appears, and therefore that the defendant may not abandon service on the Mackinac route.

All of the decided cases cited by him in this connection are cases of railroad companies. The decisions upon which apparently the appellant mainly relies are:

Chesapeake & Ohio R. R. Co. v. Commission, 242 U. S., 603.
Gasser v. Railroad Co., 205 Mich., 5.
Hocking Valley Co. v. Commission, 92 Oh. St., 9.
Bryan v. L. & N. R. R. Co., 244 Fed., 650.

The *Chesapeake & Ohio Company case* was an appeal from the judgment of a state court affirming an order of the state commission which required the railroad company to furnish passenger service on a branch line used theretofore only for transporting freight. The state court affirmed the order of the Commission, and held that the branch line was an integral part of the railway system and was, therefore, devoted to the transportation of passengers as well as of freight. This court held that the order, instead of enlarging the public purpose to which the line was devoted, only prevented a part of that purpose from being neglected, since it had always been a statutory duty to transport persons over the branch line. The case was decided, not because of any provision in the Interstate Commerce Act, but because under the state statutes a duty to carry passengers was held to rest upon the railroad company.

The case of course, is not an authority for holding that a common law duty rests upon the defendant to furnish such service, nor indeed that any statute whatever com-

pels the defendant here, on the facts involved, to furnish the service sought.

In *Gasser v. Railroad Co.*, the defendant sought to abandon its entire line. Such abandonment would have deprived a village and the surrounding country of any connection with any railroad whatever. The railroad company, by its articles, had fixed a particular route, and its only route, and it entered upon its duties as a railroad carrier. It was held that without the consent of the State it could not thus discontinue the duty which it had assumed under the Railroad Act.

The rule thus laid down in the case is now substantially embodied in the statutes of Michigan. This decision has no appreciable bearing upon the case of a Michigan vessel company ceasing to operate a particular route.

The *Hocking Valley case* was decided as it was because of the peculiar franchises, rights and privileges granted to railroad and interurban railroad companies under the laws of Ohio.

From the language used near the end of the opinion, it is apparent that even railroad companies may, under some circumstances, properly discontinue the operation of a branch line.

In the *Bryan case* the question was whether a railroad company could change its route to a location several miles from its original location.

It was not denied that, except for subsequent legislative action, the railroad company might not relocate its line, which was originally located under a special charter granted

in 1854 for the construction of a line between two cities in the State and passing through a third.

We are not here concerned with the rule applicable to railroad companies whose lines are determined by the charters granted to them or by the maps of their routes which they file when organized under the general law.

All the cases cited by the appellant are found to be cases turning upon the rights and duties of railroad companies under the statutes of different States. No one of them is such a case as is here involved of a corporation organized under an Act like the Michigan Commerce and Navigation Act, with Articles of Association such as those of the defendant. Nor, as has been said, is the plaintiff without public service by water, or by rail and water, between Detroit and Mackinac.

The attention of the court is called to the analysis of these cases set out in a foot note to the opinion on page 23 of the transcript, and to the apt language of the Court of Appeals on the page which has been quoted by us hereinabove.

3. Plaintiff makes a further argument in support of the proposition that the defendant is not relieved from its duty to afford the public the necessary service because it enjoys no right of eminent domain. He quotes on pages 24 and 25 of his brief from the opinion of the District Court and from the opinion of the Circuit Court of Appeals, and urges that what those courts have held in this regard is at variance with the decision of this court in *Central Transportation Company v. Pullman's Company, 139 U. S., 24.* In this case the purpose of the plaintiff's incorporation as stated was the "transportation of passengers in railroad

cars constructed and owned by said railroad company." The plaintiff had leased all its cars and patents to defendants for ninety-nine years and covenanted not to engage in the business of manufacturing, using or hiring cars while the contract was in effect. It thus disabled itself from performing any duty to anyone with its property. After the termination of this lease, an action was brought by it on the lease to recover rental payments. The court held that the lease was *ultra vires* and that no recovery could be had.

That the question here involved is entirely diffierent from that passed upon in the *Central Transportation case,* appears from the quotation of the opinion of Justice Gray, as follows:

> "Considering the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts, and the frank avowal, in the indenture itself, of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using or hiring sleeping cars; and that the real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendants nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties" (pages 52, 53).

The present case is obviously totally unlike the *Central Transportation case.* There is here no question of *ultra vires.* No duty rests to transport passengers at all upon

a corporation organized under the Act of 1867, or under the respondent's Articles of Association, above quoted. What it has done in no sense disables it from transporting passengers and freight upon the Great Lakes, nor even upon its Mackinac route, if circumstances hereafter seem to warrant such course. The bill distinctly avers that it is engaged in performing its duties as a common carrier upon other routes of the Great Lakes.

The fact that the Central Transportation Company which did not possess any power of eminent domain, was, under its charter conducting a business "affected with a public interest," was held to render it impossible for it to recover on a contract which totally disabled it from carrying out the business for which it was chartered. In that case there is nothing to indicate that a vessel company is bound forever to operate one of its lines which it has found it desirable to discontinue.

In the foot note to the opinion in the Court of Appeals above alluded to on page 23, after analyzing this case, the court remarks:

> "Plainly this decision is not opposed to the conclusion we have announced above."

In this general connection further the plaintiff cites *International Bridge Company v. New York, 254 U. S., 126,* to show that a permissive charter, so-called, does not excuse from performance by a carrier its duties to the public. The case holds that after the corporation had been consolidated with a Canadian corporation, it was subjected to the *duty* to operate under the terms of the Canadian charter, and that the Canadian charter imposed a duty to do what the State of New York sought to compel it to do in the construction of a foot-way and carriage-way.

It is not apparent how this decision bears upon the controversy here involved. It can hardly be urged as a ruling that a common law duty exists not to cease operation of the Mackinac route.

III.

No Statute of the United States Forbids Defendant to Cease Operating the Route.

Plaintiff seems to rely, in the main, on such statute.

There is no claim on the part of the plaintiff that the Shipping Board Act forbids it.

In the lower court, as well as in this court, it is argued that the Interstate Commerce Act forbids the defendant to discontinue the service.

An examination of the Act will show that this position is not well taken.

1. Section (1) provides that the Act shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement for continuous carriage or shipment.

Defendant is not alleged to be, and is not, a carrier wholly by railroad, nor is it a rail carrier at all, "except in the sense that it carried by water under joint tariffs with rail carriers" (Tr., 24) some through rail and lake business.

Appellant claims that under the decision of this court defendant is as specifically within the terms of the Commerce Act as any other carrier named therein (Brief, page 10). In making this claim, it relies upon the case of *Interstate Commerce Commission v. Goodrich Transit Company, 224 U. S., 194.* That case, however, does not warrant the conclusion drawn from it by appellant. The question raised in it was whether a steamship company which operated under joint tariffs made by it and connecting railroad companies covering interestate transportation, was obliged to obey the regulations of the Commission relative to its system of accounting and reports. It was held that the steamship company was obliged to comply with the regulation of the commission as regarded the filing of tariffs and reports and the following of a method of accounting. For that purpose such water carriers were held to be "as specifically within the terms of the Act as any other carrier named therein," but it was not held, and has never been held, that water carriers were generally within the operation of the Act and under the control of the commission (see note to Court of Appeals' Opinion, Tr., 23). The general supervision of water carriers is committed to the Shipping Board, created by the Act of 1916. The control of the Interstate Commission is limited to the matter of tariffs, accounts and reports. The defendant is not specifically within the terms of the Interstate Commerce Act except in respect to such matters.

2. Section (3) of the Act contains certain definitions and Section (4) requires carriers, subject to the Act, engaged in the transportation of passengers or property, to provide and furnish such transportation upon reasonable request therefore.

Appellant contends that these provisions apply to a lake carrier and compel it to furnish adequate facilities, and cites *Alaska Steamship Company v. International Union, 236 Federal, 964.* In that case it appears that the vessels of the company were engaged in interstate commerce and carried United States mail. Strikers were interfering with the loading of the vessels. The District Court enjoined such interference, holding that the defendants were conspiring to prevent the carrying on of the business of interstate commerce and the carrying of mail, and that the Act required the plaintiff to furnish all reasonable facilities for receiving, forwarding and delivering persons and property. The point of the decision is that if the company desired to continue its service it was entitled to ask the court to restrain unlawful and violent interference with its continuance. The case plainly does not hold that the company was under any duty to continue its service on a particular route if it desired to discontinue it. It is no authority for the position taken by the plaintiff here, nor does it in the slightest tend to show that the Commerce Act forbids the cessation of service on the Mackinac route.

The language of Section (4) as now amended in 1920, does not add to the duties of a carrier as they existed before the last amendment (Opinion of the District Court, Tr., 17, 18. Opinion of the Court of Appeals, 24).

Certainly a duty to furnish transportation on reasonable request, if a carrier is engaged in the transportation of passengers or property, is not a duty under the language of the Act, to continue indefinitely to engage in such transportation on a particular route like the Mackinac route.

So long as a vessel owner continues to act as a common carrier on a particular route, he owes certain duties

to the public, either statutory or common law duties; he is bound to treat people without discrimination; he is bound to furnish transportation on reasonable request; but this statute certainly does not compel defendant to continue to operate a particular line (see discussion in opinions of courts below; Tr., 17, 18 and 24). Epecially is this true if the vessel owner advises the public that he does not propose to continue operation of the route several months before the season of navigation on the Great Lakes opens.

3. That the Interstate Commerce Act has no application to the situation here involved, is put beyond question by subsection 18 of Section (1) the Interstate Commerce Act as amended by Sec. 402 of the Transportation Act adopted by Congress in 1920 (41 Statute at Large, 456, 477). That enactment now forbids a railroad carrier subject to the Act to abandon an existing line of transportation without the approval of the Interstate Commission. The phrase used in the section is not "*Any* carrier subject to the Act," found in several other places in the Act, but "a carrier by *railroad* subject to this Act."

Congress has here legislated, and recently, upon the subject of abandonment of existing lines of transportation. In so doing, it has expressly imposed the limitations created only upon railroad carriers. The express imposition of this limitation upon railroad carriers evidences an intent to exclude from the burden thereof every other common carrier subject to the Act, and therefore the defendant. The case is within the maxim: "*Inclusio unius, exclusio alterius.*"

From this language, as the Court of Appeals says:

> "Any implication of such inhibition (i. e. on dis-

continuing service on the Mackinac route) is to our minds plainly repelled by subsection 18 of the Amended Act. * * * We have no doubt the Interstate Commerce Commission rightly disclaimed jurisdiction to act in the premises upon plaintiff's request."

So far as observed, the plaintiff's counsel nowhere in his elaborate brief discusses the effect upon this case of Section 18 above considered.

We submit, therefore, that no statute of the United States forbids the defendant to discontinue the operation of the Mackinac route.

IV.

CONCLUSION.

In conclusion, we respectfully submit that the foregoing considerations show:

1. That the duty claimed by plaintiff to exist must arise from a statute or from a common law principle.

2. That no statute imposes, nor does any common law principle impose, such duty upon the defendant, a Michigan corporation organized under the Commerce and Navigation Act.

3. That this corporation is not under any duty to continue to operate its vessels upon every route upon which it has operated them in the past, there being no statute and no common law principle imposing such duty.

4. That plaintiff is seeking, without legal justification, to extend to this corporation statutes or common law principles applicable to railroad corporations, and that in so seeking he is overlooking the essential difference in the privileges granted and the duties imposed by law upon the two different kinds of corporations.

5. That the judgment of the court below should be affirmed.

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Of Counsel.

IN THE

Supreme Court of the United States

WILLIAM LUCKING,
Petitioner,
vs.
DETROIT & CLEVELAND NAVIGATION COMPANY,
Respondent.

No. ~~826~~ 212

PETITION FOR CERTIORARI

BRIEF FOR RESPONDENT

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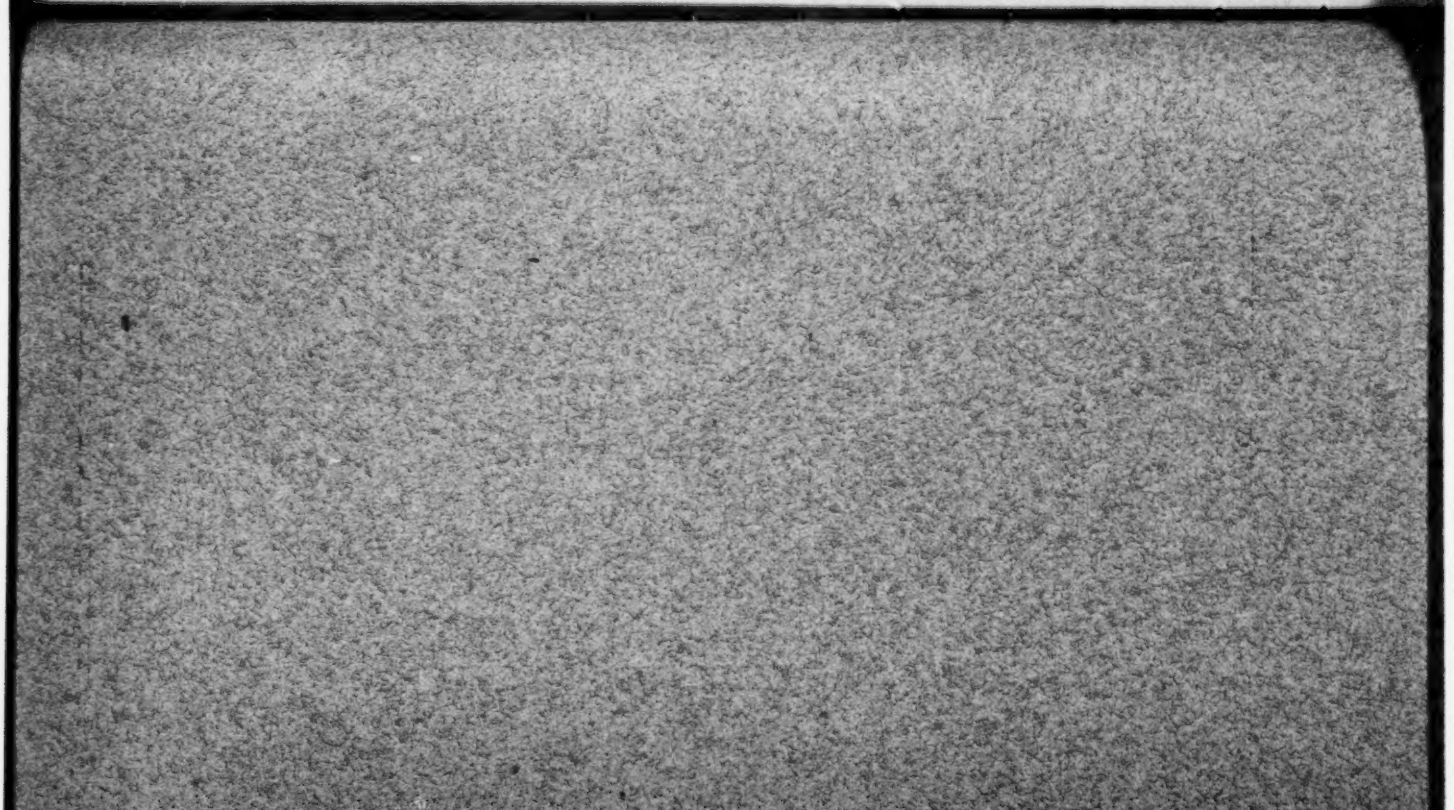

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit.

The petitioner here filed a bill in equity in the District Court of the United States for the Eastern District of Michigan, Southern Division, March 25th, 1921. In April, 1921, the defendant filed an answer to the bill, under oath, and joined with the answer a motion to dismiss the bill. The motion was heard and the Court, on May 20th, filed an opinion (273 Fed. 577) and entered

an order dismissing the bill. A petition for rehearing was filed May 31st, and the motion was denied on June 8th. On August 2nd a motion for leave to amend the bill was filed, which was denied on the same day. An appeal was taken by the plaintiff to the Circuit Court of Appeals. This was argued on March 10th, 1922, and on November 7th, 1922, the order of the District Court dismissing the bill was affirmed (284 Fed. 497).

In January, petitioner filed an appeal to this Court from the decree of the Circuit Court of Appeals, which appeal has been allowed. (See Petition herein, page 7).

The respondent is a corporation organized under the Commerce and Navigation law of Michigan. It owned, when the bill was filed, several steam vessels. It had been in the habit of running two of them between Detroit and Mackinac and St. Ignace, at the upper end of Lake Huron, over a route called the Mackinac Route. It had been in the habit of running two of them between Detroit and Cleveland, Ohio, on what is known as the Cleveland Route; and two of them between Detroit and Buffalo, New York, on what is known as the Buffalo Route.

Early in the year 1921, the plaintiff got the impression that respondent did not propose to operate any steamers on the Mackinac Route in the approaching navigation season of 1921. He filed a bill to compel the respondent to fit out two of its steamers and operate them on the Mackinac Route during the season.

There is no averment in the bill that even if this service were discontinued, plaintiff would not have public service by water or by rail and water between Detroit and Mackinac (284 Fed. 499).

The question involved was whether any duty, arising either from the common law or from statute, State or Federal, rested upon the respondent to furnish the service desired by the plaintiff, if its derectors deemed it unwise to operate its steamers on that route during that season.

An examination of the bill will show that some of the matters set forth in the brief under the caption "The Facts" are merely averments in the bill made on information and belief, such as are contained on page 4 of the breif, that respondent has made large profits on its capital invested in this so-called Mackinac Route, and that in 1919 its profits on its business equalled 25% and that it has made large net profits in its business in the past; that many of the cities along Lake Huron were developed and built up in part by the transportation service of the defendant. (See brief page 5).

In view of what has just been stated, we call the Court's attention to the statement that "by the motion to dismiss, the respondent admitted that the service over the route is necessary to the public, and that it performs this service at a profit".

The answer shows what the facts have been, but apart from it the matters above spoken of are averred upon information and belief. The theory upon which petitioner proceeds is wrong in this respect, even if the matters spoken of had any important bearing upon the ultimate question involved.

ARGUMENT.

If the respondent was under any duty to operate the Mackinac Route in 1921, when its directors thought it unwise so to operate it, it must have been because either the common law or some statute imposed the duty.

Our contention is and has been that such duty was not and is not imposed upon it.

I

NO COMMON LAW DUTY EXISTS TO OPERATE THE ROUTE.

No case can be found where such a common law duty as is here contended for has been held to exist. The individual owner who operates his vessel in maritime commerce may become a common carrier of both freight and passengers; so may a partnership; so may a corporation. The individual, the partnership and the corporation may navigate with vessels the public waters, one as freely as the other. In the earlier years of the history of this State, it was not uncommon for a man or for a partnership to own vessels which for a considerable time were run on a particular route, and for him or them to become a common carrier on that route.

See

Wright vs. Caldwell, 3 Mich. 51.
McKee vs. Owen, 15 Mich. 115.
Laffrey vs. Grummond, 74 Mich. 186.

Had such an individual ceased to operate a line which he had formerly operated between ports on the Great Lakes, he could not have been compelled, against his will, to continue to operate the line.

Judge Tuttle, in the District Court for this District, said, correctly:

"It has never been supposed and could not be seriously contended that every person who engages in the business of transportation, as a common carrier, is obliged to continue such business indefinitely, and may be restrained by injunction from abandoning such routes as he may wish to discontinue". (Rec. p. 21).

Judge Knappen, for the Circuit Court of Appeals, remarks:

"In our opinion such suspension or discontinuation of service upon one or more, or all, of the routes theretofore navigated is not forbidden by the common law under circumstances such as exist here. None of the numerous decisions which assert the power of the courts to prevent suspension or discontinuance by a railway company of its rail lines, in whole or in part, have, so far as we are advised had any relation to navigation companies. So far as decisions denying the right of a railroad company to abandon its lines or tracks may be thought to rest upon common law principles, unaided by statute, an exception, upon principle, of navigation companies such as defendant may well be found in the absence of contract, express or implied, for operating upon a given route, in connection with the lack of privileges such as eminent domain, as applied either to lines of travel (unnecessary upon the open seats) or to the acquisition of dock and wharf facilities, as well as with the common practice of navigation companies to go out of business altogether or to change routes and service from time to time, as the interests of the navigation company may dictate. But whatever may be the reason, the fact

> that the existence of the common law power asserted by plaintiff has not heretofore been judicially declared is highly significant."

So long as the respondent continues to operate a line, it is, it is true, obliged to furnish on such line reasonable service in transportation for passengers and freight. No question is involved here of the reasonableness of the service on any route which was operated by respondent when this suit was instituted. The duty of reasonable service upon operated lines is not a duty to continue service upon a line which respondent has ceased to operate.

The fact that respondent is a corporation does not impose upon it a duty to maintain its service, if it wishes to discontinue it. In this regard it is in no different position from an individual carrier.

It is not obliged at common law to maintain service on the Mackinac route under the circumstances existing here.

II.

NO DUTY IS IMPOSED ON THE RESPONDENT TO MAINTAIN SERVICE ON THE ROUTE BY THE STATUTE UNDER WHICH IT IS ORGANIZED.

The respondent's Articles of Association are as follows:

> "Article I: This corporation is formed for the purpose of engaging in the business of maritime commerce and navigation in this State or upon the frontier lakes or other navigable waters, natural or artificial connecting therewith, and for acquiring, owning, holding or disposing of every kind of personal property or estate whatsoever

which may be necessary to enable this corporation to carry on the operations and business mentioned herein."

Respondent is organized under the Act of 1867, commonly called the Commerce and Navigation Act, being Chapter 181 of the Compiled Laws of 1897, Volume 2, page 2154, entitled, "An Act to authorize the formation of corporations for the purpose of engaging in commerce and navigation." The Act provides that by compliance with its provisions persons may become a body corporate "for the purpose of engaging in the business of maritime commerce or navigation within this State or upon the frontier lakes or other navigable waters, natural or artificial, connecting therewith."

This statute was superseded by the general incorporation Act of Michigan of 1903, Act 232, Public Acts of 1903, Compiled Laws 1915, Chapter 175.

Under the Act of 1867 and under that of 1903, a vessel company is given no right to navigate any particular waters of the Great Lakes, and no duty is imposed upon it to navigate any such waters. Those associating are become a body corporate, but the Act in no manner attempts to direct how or where the corporation shall conduct its business of maritime commerce.

It will have been observed that the defendant's Articles, which constitute its charter, contain no designation or mention of the route over which navigation was to be carried on. Nor did the statute require any such designation. The corporation is given no powers except the power to be a corporation which an individual vessel owner or partnership vessel owner does not have. The

corporation may do nothing more in the way of conducting its business than an individual or partnership owner may do in operating a vessel.

The vessel company gets no more privileges from the State than does the manufacturing company; indeed, as has been said, for many years now vessel companies have been organized under the general Act which covers manufacturing companies. A vessel corporation is given no power of eminent domain; no power to build or remove bridges—no such powers, in short, as are conferred by law upon a corporation, which is organized to operate a steam railway or a street railway, or a telephone or telegraph line. No duty is imposed upon a vessel corporation to fix or maintain any particular route, as is the case with a railroad company.

As Judge Tuttle has said, "a vessel corporation has no private right of way or special facilities for acquiring a means of access by its vessels to docks or wharves; it must use the open sea as its highway, and depend for the proper maintenance of its vessels and equipment upon such arrangements as it may be able to make upon a private contract, like any other private citizen. In the eyes of the law it occupies no different position than that of a common carrier operating taxicabs or other vehicles upon land, nor is it under any greater obligation than is the common carrier just mentioned so far as continuous operation of its lines is concerned."

No duty rests upon the respondent to maintain the service in question so far as the statute under which it is organized is concerned.

III.

NO OTHER STATUTE OF MICHIGAN IMPOSES THE DUTY ALLEGED.

In the brief in support of the petition, it is not distinctly insisted in this Court that any other Michigan statute imposes the duty. There is an allusion on page 23 of the brief to the so-called tonnage tax Act of the State. The opinion in the Court below deals fully enough with such Michigan statutes including the tonnage tax act, as were discussed in that Court (284 Fed., 501, 502).

The point needs no further consideration.

IV.

THE FEDERAL STATUTES IMPOSE NO SUCH DUTY AS ALLEGED.

It is not claimed in the brief that this duty is imposed by the Shipping Board Act.

It is urged that the Interstate Commerce Act imposes the duty. Section (1), subdivision (a), Section (3), Section (4) are quoted and relied upon.

By the first sub-section Congress has, to some extent, exercised control over freight and passenger service, moving partly by rail and partly by water under joint lake and rail rates.

In sub-section (3) it has defined the word "transportation" to include vessels, and in sub-section (4) it has laid the duty upon the carrier to furnish transportation upon reasonable request therefor.

The fact that these sections appear in the Act, however, plainly does not forbid respondent to discontinue service upon and wholly to abandon its Mackinac route.

The main control of water carriers is not in the Interstate Commission, whose control is principally as to the matter of compelling the making of reports to the Commission, and as to the matter of joint lake and rail rates under joint tariffs.

Since 1920 the Interstate Commerce Commission Act has forbidden a carrier by rail to abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that public convenience or necessity permits such abandonment.

Interstate Commerce Act, as amended February 28th, 1920, Section 1, sub-section (18).

No provision of any kind is found anywhere in the Act applicable to a carrier by water which may desire to discontinue its service on a route, or portions of a route. Congress has thus recently legislated upon the subject of abandoning existing lines of transportation. It has expressly imposed the limitation which it has created, not upon "every common carrier subject to this Act," as in certain other clauses of the statute, but upon "the carrier by railroad subject to this Act." The intent plainly was to exclude from the burden so imposed every other common carrier. The very expression of Congress excludes vessel companies, like the defendant, from the restriction which it is claimed binds it in this case, while that expression includes railroads.

In the face of this language in the very Act under consideration, it cannot, we submit, properly be argued that the Interstate Commerce Act forbids respondent's discontinuance of its service on the Mackinac route.

We quote the apposite language of the Court below, referring to the subdivisions of the Act relied on by petitioners:

> "Not only do we find in these provisions of the Interstate Commerce Act no inhibition upon a carrier by water to suspend or discontinue its route or routes, in whole or in part (defendant is not a carrier by rail, except in the sense that it carries by water under joint tariffs, rates and arrangements with rail carriers), but any implication of such inhibition is to our minds plainly repelled by sub-section 18 of the amended Act, which provides" etc.

V.

THE POINTS MADE BY THE PETITIONER IN HIS BRIEF DO NOT LEAD TO THE CONCLUSION HE URGES.

Unless the respondent is compelled by law to continue indefinitely the Mackinac route, it is guilty of a breach of no duty if it discontinues operating it. If it is under any duty, it must be because the duty is imposed upon it by some statute or by common law principle, but, as we have seen, neither the common law nor the statute impose any such duty.

This furnishes a complete answer to the rather elaborate argument of the petitioner. Brief comment, therefore, is only necessary upon some of the points made by him.

1. Petitioner's point 3 is that the respondent is specifically within the terms of the Interstate Commerce Act. This point is based upon *Interstate Commerce Commission vs. Goodrich Transit Company,* 224 U. S. 194.

In that case the Commissioner had ordered the use of a certain method of bookkeeping and of reports to include intrastate as well as interstate business. The water carriers involved did some business which, under joint tariffs and joint rates with railroads, was carried partly by rail and partly by water. The question was whether the Commission had power to make the order as to bookkeeping and reports.

The Court held that the Commission had such power. That is all that was involved in the case.

Water carriers which operate under joint tariffs with railroad companies for interstate transportation are obliged, conformably with that case, to file their tariffs and their accounts with the Interstate Commission. As regards that matter, the water carriers are of course specifically within the terms of the Act, where they carry, under point tariffs evidencing the common arrangement, goods shipped partly by rail and partly by water.

No such question is raised here as was raised in the Goodrich case. That decision does not hold that there is anything in the Interstate Commerce Act which forbids respondent to discontinue its service on the Mackinac route.

The other cases cited by petitioner in this general connection have no bearing upon the point here involved, and need no discussion.

2. Under point 4, petitioner urges that the respondent is within the terms of the Interstate Commerce Act, because of the language from that Act which he quotes. This point we have already above considered.

3. Under point 5, petitioner states that common carriers are often compelled to operate branch lines where public necessity therefor appears. In support of this point he cites a good many railroad cases, but no cases such as this. He lays special stress upon the case of *Chesepeake & Ohio Railroad Co. vs. Commission,* 242 U. S. 603. A State Railroad Commission required a railroad company to furnish passenger service on a branch which had before been used only for transporting freight. The State Court affirmed an order of the Commission and held that the branch line was an integral part of the railway system, and was therefore devoted to the transportation of passengers as well as of freight. This Court affirmed on the ground that it had always been a statutory duty to transport persons over the branch line.

The case was decided, not because of any provision in the Interstate Commerce Act, but because under the State statutes a duty to carry passengers was held to rest upon the railroad company.

The case is not an authority for holding that in this case any statute at all compelled the respondent, on the facts involved here, to furnish the service sought between Detroit and Mackinac.

Allusion is also made to *Gasser vs. Railroad,* 205 Mich., 5. In this case a railroad company sought to abandon its entire line, and thus deprive a village and the surrounding country of any connection with any railroad whatever. The case adds nothing to the rules with reference to railroad companies embodied in the statutes of Michigan. It has no bearing upon the case of a Michigan vessel company ceasing to operate a particular route. Here the railroad company, by its articles, had fixed a particular route, and its only route, and entered upon its duties. It was held that without the consent of the State it could not thus discontinue the performance of the duty which it had under the Railroad Act assumed.

An examination of the cases cited by petitioner will show that they are all cases turning upon the rights and duties of railroad companies under the statutes of different States. None of them is such case as is here involved, of a corporation organized under an Act like the Michigan Commerce and Navigation Act, with Articles of Association such as those of respondent. Nor is the plaintiff without public service by water or by rail and water between Detroit and Mackinac (284 Fed. 479).

Unlike the case of a railroad company, the Articles of Association contain no designation of a route or routes over which the steamers of the Company were to be operated, and the statute itself required no such designation.

The distinction between the case of the railroad carrier and the water carrier in this respect is vital. The authorities cited in the point under discussion do not bear upon this case.

4. The point that the fact that the respondent has no power of eminent domain does not relieve it from the duty here alleged, is based upon the case of the *Central Transportation Company vs. Pullmans Car Co.*, 139 U. S., 24.

In that case the plaintiff, though a manufacturing company, was incorporated for the transportation of passengers in railroad cars constructed and to be owned by it. It had leased all its cars and patents to defendant for 99 years, and covenanted not to engage in the business of manufacturing, using or hiring cars while the contract was in effect. It had thus disabled itself from performing any duty to anyone with its property. After the termination of this lease, it sued the defendant on the lease to recover rental payments. The Court held that the lease was *ultra vires* and that no recovery could be had.

This Court said that plaintiff was charged with the duty of accommodating the public in the line of its employment, independently of its possessing any right of eminent domain.

The present case is obviously totally unlike the Central Transportation Company. Here there is no question of *ultra vires*. The defendant under the Act of 1867 is under no duty to carry passengers at all. Its discontinuance of the Mackinac Division does not disable it to transport passengers and freight upon the Great Lakes, or even to operate the Mackinac Division again if circumstances should warrant.

There is nothing in the Central Transportation case to indicate that under the Interstate Commerce Act or the common law a vessel company is bound forever to

operate one of its lines which it has found desirable to discontinue. It has no relation whatever to navigation companies. The Central Transportation Company was, under its charter, conducting a business "affected with a public interest," notwithstanding it possessed no power of eminent domain. This fact was held to render impossible recovery on a contract which totally disabled it from carrying out the business for which it was chartered. No such case is here presented, and the decision under discussion does not lead to the conclusion that the respondent was guilty of any breach of duty in discontinuing the Mackinac route.

5. In the portion of his brief headed "Conclusion," counsel states that the District Court held that such provisions as are contained in the Interstate Commerce Act and Michigan statutes are "merely declaratory of the common law." In this, we submit, counsel has fallen into error.

Judge Tuttle, in speaking of the fourth subdivision of the first section of the Interstate Commerce Act

> "It shall be the duty of every common carrier subject to this Act, engaged in the transportation of passengers and property, to provide such transportation upon reasonable request therefor"

remarked that this duty was merely declaratory of the common law rule covering the duty of common carriers. (Tr. in Court of Appeals, page 21).

The Court of Appeals states in its opinion that it agrees with the District Court in this respect (284 Fed. 502).

Neither of the courts below held as broadly as the statement of counsel appears to intimate that they did.

It seems unnecessary to comment further upon the other remarks in the last division of petitioner's brief.

VI.

As has been pointed out above, the petitioner has already perfected an appeal from the decree in the court below. It is submitted:

(1) That if an appeal is the proper remedy, this petition should be denied; and

(2) That if certiorari is the proper remedy, there is no merit in the contention of petitioner, and that in any event a writ should not issue.

Henry I. Armstrong, Jr.,
Attorney for Respondent.

Alexis C. Angell,
James Turner,
Clifton G. Dyer,
James B. Angell,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1922

No. 212

WILLIAM LUCKING,
Plaintiff and Appellant,
vs.
DETROIT & CLEVELAND NAVIGATION COMPANY,
Defendant and Appellee.

NOTICE AND MOTION

ANDREW B. DOUGHERTY,
Attorney General of the State of Michigan.
Business Address, Capitol, Lansing, Michigan.

FORT WAYNE PRINTING CO., LANSING, MICH.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1922

No. 826

WILLIAM LUCKING,
Plaintiff and Appellant,
vs.
DETROIT & CLEVELAND NAVIGATION COMPANY,
Defendant and Appellee.

NOTICE OF MOTION

Please take notice that at the opening of the session of the Supreme Court of the United States on Monday, the 25th day of February, 1924, or as soon thereafter as counsel can be heard, the undersigned will submit the annexed motion for leave to file a brief on behalf of the State of Michigan as amici curiae.

Andrew B. Dougherty

Attorney General of the State of Michigan.

Dated, Lansing, Michigan, this 13 day of February, 1924.

To Alexis C. Angell,
Attorney for Defendant and Appellee.

Therefore, leave is prayed to file a brief on behalf of the People of the State of Michigan as amici curiae.

Respectfully submitted,

Andrew B. Dougherty

Attorney General of the State of Michigan.

Dated, Lansing, Michigan, this ....13..... day of February, 1924.

In the

SUPREME COURT OF THE UNITED STATES

October Term 1923.

No. 212

WILLIAM LUCKING,
Plaintiff and Appellant,
vs.
DETROIT & CLEVELAND
NAVIGATION COMPANY,
Defendant and Appellee.

OBJECTION TO MOTION OF STATE OF MICHIGAN

ALEXIS C. ANGELL,
Attorney for Defendant and Appellee.

JUDICIAL PRINT COMPANY
DETROIT, MICH.

In the

SUPREME COURT OF THE UNITED STATES

October Term 1923.

No. 212.

WILLIAM LUCKING,
Plaintiff and Appellant,
vs.
DETROIT & CLEVELAND
NAVIGATION COMPANY,
Defendant and Appellee.

OBJECTION TO MOTION OF STATE OF MICHIGAN.

On February 14th copy of motion for leave to file a brief on behalf of the State of Michigan as "Amici Curiae" was received.

It is respectfully submitted that, in fairness to the appellee, at this late date this motion ought not to be granted.

The case is now within a few days, as we understand, of being reached for argument.

The City of Alpena and the City of Cheboygan filed briefs in the Circuit Court of Appeals (Appellant's brief, page 31). They have not even sought to file briefs in this court.

At the first hearing in the District Court in the spring of 1921, a representative of the Attorney General was present. From that time until the receipt of this motion, the Attorney General's office has taken no step in the case.

From the opinion of the Court of Appeals (Tr. pp. 24, 25) it appears that in 1921 the State of Michigan passed an Act giving the Michigan Public Utilities Commission jurisdiction to regulate rates, fares and service of any carrier by water within the State. The plaintiff filed a complaint under this Act with said Commission, under which some testimony has been taken. All of these things appear by the record, appellant's brief and the affidavit filed herewith.

Even if the State of Michigan had any interest in this case when it was begun, since the Act of 1921, such interest, we submit, has disappeared. The litigation now properly can be of interest only to the parties, but not to the State.

If the Court should see fit to grant to the Attorney General the privilege of filing a brief, as he asks, it is respectfully submitted that the argument of the cause should not be delayed. If this brief should bring up new questions which have not been argued and considered hitherto, there will be little or no time in which the appellee may file a considered brief in reply.

The brief for the appellee has been on file in this cause about four months and that in behalf of the appellant about two months. Why this sudden interest in the case at this late hour on the part of the Attorney General?

It is respectfully submitted that it would be unfair to the appellee to permit, under the circumstances, a brief to be filed by the State of Michigan at this time, when the result would be either to postpone the submission of the cause or to preclude the appellee from having a fair opportunity to consider maturely and reply to such brief.

Alexis C. Angell

Attorney for Defendant and Appellee.

In the

SUPREME COURT OF THE UNITED STATES

October Term 1923.

No. 212.

WILLIAM LUCKING,
Plaintiff and Appellant,
vs.
DETROIT & CLEVELAND NAVIGATION COMPANY,
Defendant and Appellee.

State of Michigan, County of Wayne, ss.

James Turner, being duly sworn, deposes and says that he resides in the City of Detroit, in said County, and is a member of the firm of Angell, Turner & Dyer, and is acquainted with the facts hereinafter stated.

That at the first hearing of the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity, in the spring of 1921, he was personally present, and that a representative of the Attorney General of the State of Michigan was present during the argument, and that from that time until the recent receipt of this motion, the Attorney General's office has taken no step in the case; that in the summer of 1921 the plaintiff filed a complaint with

the Michigan Public Utilities Commission under the statute of Michigan adopted in 1921, and that the Commission proceeded, in the summer of that year, to take some testimony under the complaint.

James Turner

Subscribed and sworn to before me this

19th day of February, A. D. 1924.

Minnie E. Van Deusen

Notary Public, Wayne County, Michigan.

(Seal) My commission expires

June 4 1927

3. A common carrier by water owes no common law duty not to cease operating its boats. P. 350.
4. The duty of an interstate carrier by water under § 1, subdiv. (4) of the amended Interstate Commerce Act, to furnish transportation upon reasonable request, does not oblige it to continue operation of boats on a particular route; and § 1, subdiv. (18) of the Commerce Act, concerning abandonment, relates only to railroads. P. 351.

284 Fed. 497, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed, on the merits, a bill brought by the appellant to compel the appellee to continue operating a line of steamboats.

Mr. William Lucking for appellant.

This Court may grant plaintiff full relief, whether the right thereto is based upon the provisions of the Interstate Commerce Act or upon the common-law right to compel a carrier to perform its duties, or upon a statute of Michigan. *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499; *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175; *Ohio Tax Cases*, 232 U. S. 576.

A common carrier by water is charged with the same obligations and duties as any other carrier. *The Maggie Hammond*, 9 Wall. 435; *The Lady Pike*, 21 Wall. 1; *The Niagara*, 21 How. 7; *Citizens Bank* v. *Nantucket Steamboat Co.*, 2 Story, 16.

The defendant is a common carrier, partly by railroad and partly by water, within the meaning of the Interstate Commerce Act, and is as specifically within the terms of that act as any other carrier named therein. *Interstate Commerce Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194; *Pipe Line Cases*, 234 U. S. 548; *Stevens* v. *Telephone Co.*, 240 Fed. 759; *United States* v. *Union Stock Yard Co.*, 226 U. S. 286; *Pennsylvania Co.* v. *United States*, 236 U. S. 351; *Alaska S. S. Co.* v. *Association*, 236 Fed. 964.

That the appellee is clearly within the terms of the Interstate Commerce Act is shown by the different amendments to the act. *Pennsylvania Co.* v. *United States,* 236 U. S. 351; *Chicago, etc. Ry. Co.* v. *Hardwick Elevator Co.,* 226 U. S. 426; *Ellis* v. *Interstate Commerce Comm.,* 237 U. S. 434; *Pacific S. S. Co.* v. *Railroad Co.,* 251 Fed. 218.

Common carriers are often compelled to operate branch lines where the public necessity therefor appears.

That defendant enjoyed no right of eminent domain from the State of Michigan, does not relieve it from its duty to afford the public an admittedly necessary transportation service.

The public importance and necessity for this service cannot be doubted.

Mr. Alexis C. Angell, with whom *Mr. James Turner, Mr. Clifton G. Dyer* and *Mr. James B. Angell* were on the brief, for appellee.

Mr. Justice Butler delivered the opinion of the Court.

March 25, 1921, appellant filed his complaint in the District Court for the Eastern District of Michigan, praying a mandatory injunction to compel appellee to operate its steamboats, Alpena II and Mackinac II, on the Detroit and Mackinac route in the navigation season of that year, as it had done in prior years.

Appellee is a corporation organized under the laws of Michigan, and has long been a common carrier of passengers and freight for hire on steamboats operated by it between Detroit, Michigan, and Cleveland, Ohio, between Detroit and Buffalo, New York, and between Detroit and Mackinac Island, Michigan. For many years, by arrangement with carriers by rail, it had carried some passengers and freight under joint lake and rail tariffs providing for continuous carriage, partly by railroad and partly by

water, to and from various ports reached by its steamers, and to and from points on lines of carriers by railroad. Appellee proposed to discontinue service on the route between Detroit and Mackinac Island. The complaint alleged that appellant had been in the past, and that he desired to become, in the season of 1921 and thereafter, a passenger and a shipper of freight on appellee's steamers on the Detroit and Mackinac route. It further alleged that it was appellee's duty to provide and furnish transportation for passengers and property during that season and thereafter over the route above named, and that to abandon such service would violate the Act to Regulate Commerce, as amended, and particularly subdivisions (1) (a), (3) and (4) of § 1. Appellee moved to dismiss the complaint on the ground that the court was without jurisdiction, and that appellant was not entitled to the relief prayed. The District Court held that the suit involved a federal question and was within its jurisdiction; and, on the merits, decided that appellant was not entitled to relief and dismissed the complaint. 273 Fed. 577. The Circuit Court of Appeals affirmed the decree. 284 Fed. 497. The case is here on appeal under § 241 of the Judicial Code.

On the allegations of the complaint, the suit is one arising under the laws of the United States, and particularly the Act to Regulate Commerce. Its decision involves the construction and application of certain provisions of that act. It was rightly held in the courts below that the District Court had jurisdiction. *Louisville & Nashville R. R. Co.* v. *Rice*, 247 U. S. 201, 203; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 506, 508.

There remains the question whether appellee was bound to resume and maintain the service.

The obligation was not imposed by appellee's charter or the statutes of Michigan. The company was organized

under the Commerce and Navigation Act of 1867; c. 181, Compiled Laws 1897. By compliance with the provisions of that act, persons were authorized to become a body corporate "for the purpose of engaging in the business of maritime commerce or navigation within this state, or upon the frontier lakes or other navigable waters, natural or artificial, connected therewith, . . ." The General Corporation Act of Michigan of 1903; Compiled Laws 1915, c. 175; superseded the Act of 1867, but contained a saving clause as to rights which had been secured under the earlier act. The act under which appellee was organized does not prescribe or require the articles to specify any route over which such a corporation is to operate its boats, and does not require it to continue in business. Appellee's articles of association adopted the statutory language, and do not designate any route for the operation of its boats, or require it to continue operation. Appellee has no power of eminent domain or special privilege or right in respect of the business it is authorized to do, which a natural person owning a vessel and engaged in the same business does not have. It is under no contractual obligation to operate on the route in question. Act No. 56, Public Acts 1919, provides that no person, firm or corporation owning or operating any railroad shall abandon its main line or track or any portion thereof without the permission of the State Commission. There is no similar statute relating to carriers by water.

The obligation to continue is not imposed by any principle of the common law. Reasonableness of service on a route over which appellee operates boats is not involved. The duty to furnish reasonable service while engaged in business as a common carrier is to be distinguished from the obligation to continue in business. No case has been cited by counsel, and we know of none, in which it has been held that there is any common law duty

on a common carrier by water not to cease to operate its boats.[1]

The obligation to continue service is not imposed by any federal statute. Appellant relies on § 1, subd. (1) (a), of the Interstate Commerce Act (as amended by § 400, Transportation Act, 1920) which provides that the act shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for continuous carriage or shipment; and a provision in subd. (3) defining "carrier" to mean "common carrier", and "transportation" to include locomotives, cars and other vehicles, *vessels,* and all instrumentalities of shipment or carriage; and a provision of subd. (4) making it the duty of every common carrier, subject to the act, engaged in the transportation of passengers or property, to provide and furnish such transportation upon reasonable request therefor.

But in connection with these provisions, there should be read subd. (18) of the same section, which provides that no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit such abandonment.

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[1]Appellant cited: *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Comm.,* 206 U. S. 1; *Missouri Pac. Ry. Co.* v. *Larabee Flour Mills Co.,* 211 U. S. 612; *Bryan* v. *Louisville & N. R. Co.,* 244 Fed. 650; *Lee Line Steamers* v. *Memphis, H. & R. Packet Co.,* 277 Fed. 5; *Colorado & So. Ry. Co.* v. *R. R. Commission,* 54 Colo. 64; *State* v. *Dodge City M. & T. Ry. Co.,* 53 Kans. 377; *So. Ry. Co.* v. *Franklin R. R. Co.,* 96 Va. 693; *People v. Albany & Vt. R. R. Co.,* 24 N. Y. 261; *So. Ry. Co.* v. *Hatchett,* 174 Ky. 463; *State* v. *Spokane Street Ry. Co.,* 19 Wash. 518; *State* v. *Bullock,* 78 Fla. 321. And see note, 284 Fed. 500, 501. These cases are readily distinguishable.

Carriers by water, such as appellee, are within the terms of the Transportation Act for certain purposes; e. g., for the regulation of their accounts, the making of reports, the prevention of rebates, discrimination and the like. Certain provisions of the act are applicable to some carriers and not to others. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 208. The imposition of a duty upon a carrier by water to furnish transportation upon reasonable request does not create an obligation to continue to operate boats on a particular route. The provision of subd. (18) above referred to is specifically limited to lines of railroad. This indicates legislative intention that carriers by water are not required to continue and may cease to operate if they see fit.

No duty to continue to operate its boats on the Detroit and Mackinac Island route is imposed on appellee by its charter, the statutes of Michigan, the common law or federal statutes.

Decree affirmed.

ST. CLOUD PUBLIC SERVICE COMPANY *v.* CITY

LUCKING *v.* DETROIT & CLEVELAND NAVIGATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 212. Argued March 11, 12, 1924.—Decided May 26, 1924.

1. A suit by a past and prospective passenger and shipper to compel continued operation of a steamboat route as a service required by the Act to Regulate Commerce, *held* within the jurisdiction of the District Court as one arising under the laws of the United States. P. 349.
2. A corporation organized under the Michigan Commerce and Navigation Act of 1867; c. 181, Comp. Laws 1897, to operate steamboats, no particular route being designated, and which had no power of eminent domain or special privilege respecting its business, *held* free, under the law of Michigan, in the absence of any restraining contract, to abandon operation of one of its routes. *Id.*